

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**



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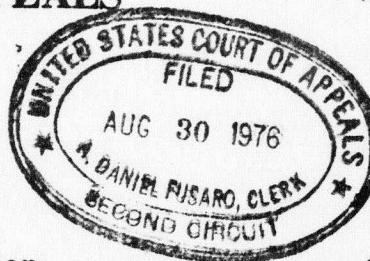
76-7318

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UNITED STATES COURT OF APPEALS

for the  
SECOND CIRCUIT

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In the Matter of the Petition for Arbitration

Between

FAIR WIND MARITIME CORPORATION, as Owners of the  
S. S. "ISABENA",

B P/S  
Petitioner-Appellee,

and

TRANSWORLD MARITIME CORPORATION, as Charterer,

Respondent-Appellant.

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ON APPEAL FROM A FINAL ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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JOINT APPENDIX

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HARRINGTON HARLOW  
Attorney for Appellant  
Transworld Maritime Corporation  
800 Third Avenue  
New York, New York 10022

HEALY & BAILLIE  
Attorneys for Appellee  
Fair Wind Maritime Corporation  
29 Broadway  
New York, New York 10006

(5675)

PAGINATION AS IN ORIGINAL COPY

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## Docket Sheet from District Court

DATE	NR.	PROCEEDINGS	Pierce
5-21-76		Filed petition to compel arbitration.	
5-23-76		Filed pltffs affdvt & notice of motion for an order & judgment directin deft to arbitrate, etc. Ret. 6-4-76.	
5-23-76		Filed pltffs memo of law in support of motion.	
6-3-76		Filed Endorsement & Order on motion dtd 5-25-76. The within motion directing def't to proceed to arbitration in accordance with an order of 12-17-73 by Judge Pierce in a prior action (73 Civ 2722, LWP) adjudicating the deft in contempt for refusing to obey Judge Pierce's order, & for an order awarding the pltff its costs & atty's fees, is respectfully referred to Judge Pierce. The pltff seeks enforcement of a duly issued order of a judge of coordinate jurisdiction, which matter should properly be presented to the issuing judge..... MAC MAHON, J.	
6-11-76		Filed Affidavit by deft Harlow in oppositin to pltffs motion for an order and judgment, etc, as indicated.	
6-11-76		Filed defts memorandum of law as indicated.	
6-21-76		Filed deft's affdvt in support of deft's motion for an adjournment of the hearing of a motion to be made by pltff before J. Mac Mahon on 6-4-76, etc.	
6-18-76		Filed Endorsement & Order on motion dtd 5-25-76. Pltff seeks an order compelling the deft to proceed to arbitration. Deft opposes the application on the ground that it has objected to the arbitration panel. Deft has also made a cross-motion for disqualification of the panel. For the reasons indicated, the pltffs motion for an order compelling arbitration is granted. The pltffs application is denied in all other respects. The defts cross--motion to disqualify the arbitration panel is denied.....So Ordered, PIERCE,J. n/m Filed Notice that deft Transworld Maritime Corporation appeals to the U.S.C.A.P. from so much of the final order entered on 6-18-76 etc, as indicated. N/M	
06-28-76		Filed notice endorsement on unsigned order: The Ex Parte Motion for a stay pending appeal is denied. Pierce, J. N/M	
07-01-76		Filed Notice that Transworld Maritime Corp. hereby appeal to the U.S.C.A.P. from the final order entered on 6-30-76. N/M.	
7-15-76		Filed transcript of record of proceedings dtd: June 4-76.	

A TRUE COPY  
RAYMOND F. BURGHARDT, CLERK

By M. Grib  
Deputy Clerk

BEST COPY AVAILABLE

B

## Petition to Compel Respondent to Proceed to Arbitration

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JUDGE MAC MAHON

In the Matter of the Arbitration : 76 CIV. 2293

between :

FAIR WIND MARITIME CORPORATION, :  
as Owners of the S.S. "ISABENA", :  
Plaintiff, : PETITION

and :

TRANSWORLD MARITIME CORPORATION, :  
as Charterers, :  
Defendant,  
Under a Charter Party dated :  
June 14, 1972.

The petition of Fair Wind Maritime Corporation respectfully shows:

1. At all times hereinafter mentioned, plaintiff was a Panamanian corporation and Owner of the S.S. ISABENA.

2. Upon information and belief, at all times hereinafter mentioned, defendant was, and still is, a foreign corporation doing business in New York through its agents, Admiralty Agencies Ltd., with an office at 17 Battery Place, Suite 1918, New York, New York 10004.

3. By charter dated June 14, 1972 at New York, New York, plaintiff, as Owner of the S.S. ISABENA, agreed to let, and defendant, as Charterer agreed to hire, the said S.S. ISABENA for a period of 15 to about 60 days for lightering operations at the port of Karachi.

4. The said charter party contains the following clause relating to arbitration:

"17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purposes of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

## Petition to Compel Respondent to Proceed to Arbitration

5. Disputes arose between plaintiff and defendant under the said charter and thereafter plaintiff on June 7, 1973 made written demand upon defendant for arbitration naming as an arbitrator Mr. Lloyd C. Nelson.

6. Defendant failed and refused to appoint an arbitrator and, on December 13, 1973, this Court (Docket No. 73 Civ. 2722 LWP) appointed Prof. Joseph Sweeney as an arbitrator on defendant's behalf, and ordered defendant to proceed to arbitration.

7. Defendant has willfully and contemptuously refused to arbitrate in accordance with the Court's order.

WHEREFORE, plaintiff moves this Court for an order directing that the arbitration proceed forthwith in the manner provided in said contract of charter party and this Court's order of December 17, 1973; that plaintiff have judgment for its damages including costs and reasonable attorneys' fees and that the Court grant such other, further and different relief as may be just in the premises.

Dated: New York, New York  
May 20, 1976

Yours, etc.

HEALY & BAILLIE  
Attorneys for Plaintiff  
Office & P.O. Address  
29 Broadway  
New York, N.Y. 10006

By William F. Healy Jr.  
A Member of the Firm

Affidavit of Jack Greenbaum, Esq., in Support of Petitioner's Application  
for an Order Compelling Respondent to Proceed to Arbitration

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter of the Arbitration :

between : 76 Civ. 2293 (LPM)

FAIR WIND MARITIME CORPORATION, :  
as Owners of the S.S. "ISABENA", Plaintiff :  
Plaintiff : AFFIDAVIT

and :

TRANSWORLD MARITIME CORPORATION, :  
as Charterers, :  
Defendant, :  
Under a Charter Party dated :  
June 14, 1972.

-----x  
STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

JACK A. GREENBAUM, being duly sworn, deposes and  
says:

1. I am associated with the firm of Healy &  
Baillie, attorneys for the plaintiff, and I am familiar with  
the prior proceedings herein.

2. This affidavit is submitted in support of plain-  
tiff's motion for an order and judgment,

a) pursuant to 9 U.S.C. §4, di-  
recting the defendant to arbitrate,  
as previously ordered by the Court;

b) pursuant to F.R. Civ. P.  
Rule 54(d), awarding to plaintiff  
its costs and attorneys' fees;

c) pursuant to F.R.Civ.P. Rule  
70, and Civil Rule 14, adjudicating  
the defendant in contempt for its re-  
fusal to obey the Court's previous  
order compelling arbitration, and

Affidavit of Jack Greenbaum, Esq., in Support of Petitioner's Application  
for an Order Compelling Respondent to Proceed to Arbitration

d) pursuant to 28 U.S.C.  
§1927, ordering defendant's counsel,  
Harrington Harlow, to pay plaintiff  
its costs, including attorneys'  
fees, incurred by reason of Mr.  
Harlow's unreasonable and vexatious  
multiplication of the proceedings.

3. Plaintiff was the owner of the S.S. ISABENA, a vessel which capsized and was lost while performing under a charter party with defendant, dated June 14, 1972. Plaintiff seeks to arbitrate its claim that the loss was caused by the defendant's faulty stowage of the cargo. The charter contains the following clause relating to arbitration:

"17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

4. On June 7, 1973, plaintiff appointed Mr. Lloyd C. Nelson as its arbitrator and demanded that defendant appoint an arbitrator as well, but defendant refused. On June 19, 1973, plaintiff commenced a proceeding to compel defendant to arbitrate (docket number 73 Civ. 2722 LWP).

5. Defendant opposed the petition to compel arbitration on the grounds that the charter party on its face allegedly relieved the defendant of any liability, and denied that there was a "dispute" between the parties. On August 29, 1973, Judge Pierce granted the petition, without opinion.

6. On September 25, 1973, defendant applied "to alter or amend" the decision (long after the 10 days permitted for a reargument by General Rule 9m of this Court), on the

Affidavit of Jack Greenbaum, Esq., in Support of Petitioner's Application  
for an Order Compelling Respondent to Proceed to Arbitration

grounds that the underlying issues were so complex that they could not properly be decided by commercial arbitrators. At the same time, defendant requested a jury trial, overlooking the fact that jury trials are not available in admiralty contract matters. On November 27, 1973, Judge Pierce affirmed his earlier decision in an opinion which is annexed hereto as Exhibit A.

7. Despite another motion by defendant to "adjourn" the entry of the order compelling arbitration, Judge Pierce did, on December 17, 1973, order the defendant to proceed with the arbitration, and appointed Prof. Joseph Sweeney as an arbitrator on defendant's behalf. A copy of the order is annexed hereto as Exhibit B.

8. On January 15, 1974, defendant filed a notice of appeal from Judge Pierce's order. The appeal was heard on May 16, 1974, and the decision was affirmed from the bench, at the close of defendant's argument. Judge Kaufman ruled that defendant's arguments were completely without any merit, and the Court of Appeals did not even need to hear the plaintiff's oral argument.

9. In due course, the two arbitrators appointed Mr. Harry Webber as the third member of the panel, and the first hearing was held on December 8, 1975. The panel made the disclosures required by law, and defendant's counsel, Mr. Harlow, questioned the members of the panel. At that time, Mr. Harlow purported to accept the panel for the purpose of deciding the defendant's intended application to dismiss the arbitration, but for no other purpose. Deponent pointed out that defendant must accept the panel as unbiased, or express any objections in this respect, but that defendant could not accept the panel as qualified for some purposes, and not for others. However, Mr. Harlow maintained his position. The colloquy on this is found at pages 7-12 of the transcript, annexed as Exhibit C.

Affidavit of Jack Greenbaum, Esq., in Support of Petitioner's Application  
for an Order Compelling Respondent to Proceed to Arbitration

10. Mr. Harlow persisted in the argument he had made to the Court, that there was no "dispute", notwithstanding the use of the very word "dispute" in the Court's order compelling arbitration. (Exh. C, pp. 12-22).

11. The panel rejected Mr. Harlow's request to submit briefs on defendant's motion to dismiss the arbitration, ruling instead that it would make a determination only after hearing all of the evidence. (Exh. C, pp. 22-27). At that point, Mr. Harlow, in an unprecedented maneuver, refused to proceed with the arbitration unless his motion were heard, and he walked out. (Exh. C, p. 33). It is respectfully submitted that this act alone constitutes contempt of the panel and of the Court's order compelling arbitration, but the matter did not end there. As a result of Mr. Harlow's action, the panel reversed its ruling and agreed to receive briefs. (Exh. C, pp. 33-34). The briefs were submitted, and, on February 27, 1976, the panel unanimously denied defendant's motion, without a written opinion. (Exh. D annexed hereto). On March 4th, Mr. Harlow demanded an explanation, (Exh. E. Mr. Harlow's reference to plaintiff's failure to answer his brief is in error. Mr. Harlow's brief was a reply to plaintiff's brief in opposition to Mr. Harlow's motion. A sur-reply by plaintiff was not in order.), and on March 10th, the arbitrators again ruled that they wished to hear the evidence. (Exh. F).

12. On April 8, 1976, deponent called the office of the panel chairman, and wrote to the panel and Mr. Harlow, urgently requesting a hearing in late April or in May, because a Chinese seaman would then be available to testify. (Exh. G).

13. On April 10, 1976, Mr. Harlow wrote to the panel, refusing to proceed with the arbitration, allegedly on the grounds of possible bias by one of the arbitrators, and the

Affidavit of Jack Greenbaum, Esq., in Support of Petitioner's Application  
for an Order Compelling Respondent to Proceed to Arbitration

fact that Prof. Sweeney, who was appointed 28 months previously, allegedly was not a "commercial man". (Exh. H). Although deponent is indicated as the recipient of a carbon copy of Mr. Harlow's letter, the fact is that the letter was not received. Deponent only learned about the letter and received it from the panel chairman after the latter's return from abroad, on or about May 11th.

14. As appears from the accompanying memorandum of law, an allegation of possible bias is not a valid ground for refusing to proceed with arbitration. Moreover, defendant has waived any such objection by accepting the panel for the purpose of determining the merits of defendant's motion for summary judgment. The objection concerning Prof. Sweeney was not raised until two years after his appointment by the Court, and therefore any such objection has been waived.

15. It is patent that every action by defendant and its counsel has been designed flagrantly to thwart the very purpose of the arbitration procedure: the expeditious resolution of commercial disputes. Defendant has willfully and contemptuously refused to obey the Court's order of December 17, 1973, with no justification whatever. Mr. Harlow's actions have undeniably multiplied the proceedings, increasing the costs unreasonably and vexatiously. The detriment to plaintiff in this case is all the more serious, because defendant's latest refusal to arbitrate has frustrated plaintiff's ability to produce its main witness, a foreign seaman. Indeed, defendant's refusal was a direct response to plaintiff's offer of this seaman's testimony. It is not presently known when the witness can again be made available to testify. Plaintiff had advised that the seaman, the Master of a vessel, would be in Japan in March and could obtain a visa to come to the U.S. in April or May, and possibly in June. However, it is obvious that he must return to duty and it will be a hardship to remove him from a vessel and replace him, in order for him to testify if it is possible at all.

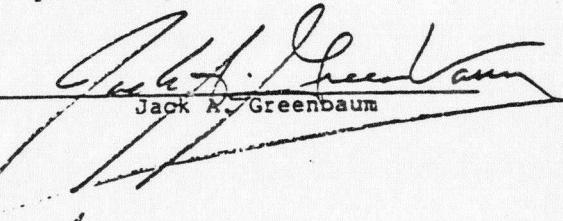
Affidavit of Jack Greenbaum, Esq., in Support of Petitioner's Application  
for an Order Compelling Respondent to Proceed to Arbitration

16. Deponent has already recorded 55 hours of time on this matter, and Nicholas J. Healy, Jr. of this firm has invested substantial time as well. Yet, in the three years since arbitration was demanded, the panel has not yet begun to hear the merits because of defendant's obstructive tactics.

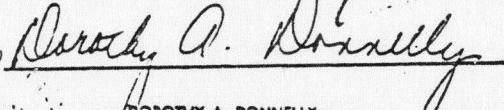
17. It should also be pointed out that plaintiff received a judgment for \$197.68 for the cost of appeal briefs, which has not been paid although demanded in a letter to defendant's counsel dated August 12, 1974.

18. In the circumstances, the law warrants an allowance of damages, including attorneys' fees, as discussed in the accompanying memorandum of law.

WHEREFORE, it is respectfully requested that defendant be directed to proceed with the arbitration and to pay to plaintiff the costs of this proceeding.

  
Jack A. Greenbaum

Sworn to before me this  
24th day of May, 1976

  
Dorothy A. Donnelly

DOROTHY A. DONNELLY  
Notary Public, State of New York  
No. 43-01004520753  
Qualified in Richmond County  
Certificate Filed in New York City  
Commission Expires March 30, 1978

Exhibit A to Greenbaum Affidavit - Opinion of Judge Pierce dated  
November 27, 1973

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✓

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration

between

FAIR WIND MARITIME CORPORATION,  
as Owners of the S.S. ISABENA,

: 73 Civ. 2722

Petitioner, :

and

TRANSWORLD MARITIME CORPORATION,

Respondent. :

APPEARANCES:

NICHOLAS J. HEALY, JR., ESQ.  
HEALY & BAILLIE  
29 Broadway  
New York, New York 10006

Attorney for Petitioner

HARRINGTON HARLOW, ESQ.  
GIFFORD, WOODY, CARTER & HAYS  
One Wall Street  
New York, New York 10005

Attorney for Respondent

LAWRENCE W. PIERCE, D.J.

FILED  
U.S. DISTRICT COURT  
S.D.N.Y.

Nov 28 1973 FH '73

Exhibit A to Greenbaum Affidavit - Opinion of Judge Pierce dated November 27, 1973

MEMORANDUM OPINION

Petitioner is a Panamanian corporation and the owner of the S.S. Isabena. Respondent is a foreign corporation doing business in New York through an agent.

The parties entered into a Charter Party on June 14, 1972, for a time charter for the S.S. Isabena for 15 to about 60 days for lightening operations at the port of Karachi. During this period and while in the possession of respondent, the vessel was loaded with grain and several days later, on July 4, 1972, sank. The Master and four crew members lost their lives.

Almost one year later, on June 7, 1973, petitioner's attorneys made a written demand for arbitration of petitioner's claims for "the loss of the Vessel and various expenses and liabilities which may be incurred as a consequence of the vessel capsizing at the Port of Karachi."

Upon respondent's failure to appoint an arbitrator, as requested by petitioner, petitioner sought, pursuant to Title 9, United States Code, Sections 4 and 5, to have this court appoint an arbitrator and direct respondent to proceed to arbitration "in accordance with the terms and conditions of [the] Charter Party . . . ." Paragraph 17 thereof provides as follows:

Exhibit A to Greenbaum Affidavit - Opinion of Judge Pierce dated November 27, 1973

"17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Respondent opposed the petitioner's motion asserting that "the said Time Charter Party on its face relieves [respondent] of any liability for any loss which occurred to petitioner because of the loss of the S.S. Isabena."

Respondent relied upon Clauses 1 and 26 of the Charter Party which read:

"1. That the Owners (FAIR WIND) shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engineroom and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service."

"26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account."

Exhibit A to Greenbaum Affidavit - Opinion of Judge Pierce dated November 27, 1973

Respondent requested a trial of "the issue of whether or not there is a 'dispute' between the parties which is an appropriate subject matter for arbitration."

This Court having concluded, from the affidavits submitted, that no issue existed as to the making of the agreement for said arbitration or the failure to comply therewith, and rejecting respondent's request that the Court determine whether a "dispute" appropriate for arbitration existed, granted petitioner's motion to compel arbitration and denied respondent's motion for a trial of the above-stated issue, and directed the petitioner to submit an order on notice to respondent.

Respondent now moves to alter or amend the aforesaid decisions and to have this matter referred for trial on the merits by this Court for the reason that the legal questions involved are of such a complicated nature that they should not be left to the decision of "commercial men" but, in the exercise of discretion, should be decided by a court of law in a duly constituted jury trial.

Respondent further contends that "[i]nasmuch as Fair Wind [petitioner] is making a claim for the full value of the 'Isabena' and raises other consequential legal issues, the matter requires judicial determination as to all of the

Exhibit A to Greenbaum Affidavit - Opinion of Judge Pierce dated November 27, 1973

issues," factual and legal. Respondent asserts that in agreeing to the arbitration clause, there was no contemplation by the respondent that the arbitration would cover the loss of the vessel.

This Court would have jurisdiction in admiralty of the subject matter of the suit herein arising out of the controversy between the parties (28 U.S.C. 1333) save for the written agreement which provides for arbitration (9 U.S.C. 4).

There is no dispute regarding the assertion that the parties entered into the agreement which contains the arbitration clause or that the respondent has failed to comply therewith. In discussing 9 U.S.C. 3, the U.S. Supreme Court in Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) instructs that ". . . a federal court may consider only issues relative to the making and performance of the agreement to arbitrate."

The argument that certain issues could not have been contemplated by the parties at the time they entered into the charter party and agreed to arbitrate disputes is resolved by applying to the instant facts the language of Hilti, Inc. v. Oldach, 392 F.2d 368, 372-3 (1st Cir. 1968): "The short answer is that the portion of the arbitration clause which reads 'Any controversy or claim arising out of

Exhibit A to Greenbaum Affidavit - Opinion of Judge Pierce dated November 27, 1973

or relating to the breach thereof shall be settled by arbitration . . . .' cannot be construed so narrowly . . . . The broad language of the arbitration clause forces us to conclude that the parties intended to arbitrate all disputes arising thereunder irrespective of whether they were foreseeable at the time of agreement." See also Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).

Judge Augustus N. Hand in Canadian Gulf Line v. Continental Grain Co., 98 F.2d 711 (2d Cir. 1938) wrote: "The dispute here arose out of a 'maritime transaction' and there was an agreement stated in the broadest terms to submit such disputes to arbitration . . . . Arbitration sometimes involves perils, that even surpass 'perils of the seas' . . . . Whether in any particular instance it is a desirable risk is not for us to say. It is a mode of procedure fostered by statute and in the present case invoked under the agreement of the parties. If they consent to submit their rights to a tribunal with extensive powers and subject to a most restricted review, they cannot expect the courts to relieve them from the effect of their deliberate choice." Id. at 714 (citation omitted).

Judge Harold Medina in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959)

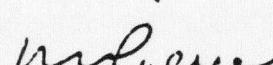
Exhibit A to Greenbaum Affidavit - Opinion of Judge Pierce dated November 27, 1973

held that section 2 of the Arbitration Act "makes 'valid, irrevocable and enforceable' only a 'written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . .'" He added that "any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." Id.

Based upon the foregoing, respondent's motion to alter or amend the Court's decision of August 29, 1973 is denied. Petitioner's application for an award of attorney's fees is denied. This Court, of course, expresses no view as to the merits of the controversy. But in denying petitioner's application for attorney's fees, the Court notes that the motion of respondent, while not sustained, raises issues which are not deemed frivolous.

SO ORDERED.

Dated: New York, New York  
November 27, 1973

  
\_\_\_\_\_  
LAWRENCE W. PIERCE  
U. S. D. J.

## Exhibit B to Greenbaum Affidavit - Order Compelling Arbitration

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



In the Matter of the Arbitration  
between

73 Civil 2722 LWP

FAIR WIND MARITIME CORPORATION, as  
Owners of the S.S. ISABENA,

ORDER APPOINTING  
ARBITRATOR

Petitioner,  
and

TRANSWORLD MARITIME CORPORATION,

Dec 11 1973

Respondent.

A petition having been filed by FAIR WIND MARITIME CORPORATION, as Owners of the S.S. ISABENA, pursuant to the provisions of 9 U.S.C. §§4 and 5, praying for an order appointing an arbitrator and directing respondent TRANSWORLD MARITIME CORPORATION to proceed to arbitration of a dispute arising under a certain contract of Charter Party dated June 14, 1972, pursuant to the provisions of Clause 17 of said Charter Party, and said petition having come on for hearing after due service of a notice of motion therefor, and the Court having considered the affidavits of Nicholas J. Healy, Jr. and Helen M. Ryan and the arguments of counsel in support of and in opposition to the application, and after due deliberation thereon, and on filing the decision of the Court on August 29, 1973, and it appearing to the satisfaction of the Court that the making of the agreement for said arbitration or the failure to comply therewith is not in issue, and the respondent having moved to alter or amend the aforesaid decision and the Court, upon considering the affidavit of Gerald J. Ross in support and of Nicholas J. Healy, Jr. in opposition thereto, having denied said motion to amend by opinion number 40058 dated November 27, 1973,

it is

## Exhibit B to Greenbaum Affidavit - Order Compelling Arbitration

✓ ORDERED, that the application of the petitioner for an order compelling arbitration and appointing an arbitrator herein be and the same hereby is granted and that Joseph C. Sweeney be and he hereby is designated and appointed an arbitrator; and that the said Joseph C. Sweeney shall act under the said contract to arbitrate between the parties herein with the same force and effect as if he had been nominated by the respondent herein, and it is further

ORDERED, that FAIR WIND MARITIME CORPORATION, petitioner herein, recover of TRANSWORLD MARITIME CORPORATION, respondent herein, its costs and disbursements in this proceeding, to be taxed by the Clerk.

✓ Dated: December <sup>17</sup>~~13~~, 1973  
AT NEW YORK, N.Y.

Barry Fine  
U. S. D. J.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

In the Matter of the Arbitration

-between-

FAIR WIND MARITIME CORPORATION,  
as Owners of the S.S. "ISABENA",

-and-

TRANSWORLD MARITIME CORPORATION,  
as Charterers,

Under a Charter Party dated  
June 14, 1972.

December 8, 1975  
12:50 p.m.

29 Broadway  
New York, New York

B E F O R E :

HARRY G. WEBBER,  
Chairman

LLOYD C. NELSON,

JOSEPH SWEENEY,  
Arbitrators.

Exhibit "C"

Certified Shorthand Reporters



Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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2 APPEARANCES :

3 Messrs. HEALY & BAILLIE  
4 Attorneys for Owner  
5 29 Broadway  
6 New York, New York

7 BY: JACK GREENBAUM, ESQ.,

8 of Counsel

9 HARRINGTON HARLOW, ESQ.,  
10 Attorney for Charterer  
11 800 Third Avenue  
12 New York, New York

13 -oo-

14  
15 (The Arbitrators, Messrs. Webber, Nelson  
16 and Sweeney, were duly sworn by the Notary  
17 Public (Jack Finz, CSR).

18 THE CHAIRMAN: Let the record show that  
19 this is the initial hearing in the arbitration  
20 of disputes between Fair Wind Maritime Company,  
21 owners of the steam tanker ISABENA, and  
22 the Transworld Maritime Corporation, charterer,  
23 under a charter party dated June 14, 1972.

24 May I have the agreement of the disputants  
25 that this arbitration be conducted under the

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2           rules of the Society of Maritime Arbitrators,  
3           Inc., as amended July 1, 1974, with the exception  
4           of Rule 32, which is the 90-day rule, being  
5           waived?

6           MR. GREENBAUM: The claimant shipowner  
7           is agreeable to that.

8           MR. HARLOW: I do not accept the rules  
9           of the Society.

10          THE CHAIRMAN: If this is the position,  
11          we will proceed.

12          The oath given will also apply to the  
13          Panel's disclosures which will follow.

14          Mr. Nelson, may we please have your  
15          disclosure?

16          MR. NELSON: I have no personal or business  
17          connection with any of the parties to this  
18          dispute. As a matter of fact, I've never  
19          heard of the parties to this dispute before  
20          today.

21          I have sat in arbitrations involving  
22          both law firms. I've sat with Mr. Webber  
23          on several arbitrations, and I'm still sitting  
24          with Mr. Webber on several arbitrations.

25          I've never met Professor Sweeney before.

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2           We have talked on the phone. And we did,  
3           in fact, agree to have Mr. Webber join us as a  
4           third member of this Panel.

5           On vessels for whom we act as agents  
6           in New York, the firm of Healy & Baillie represents  
7           the owners and underwriters on admiralty matters  
8           when they occur in the Port of New York. And  
9           I have no further disclosure to make at this time.

10          THE CHAIRMAN: Professor Sweeney?

11          PROFESSOR SWEENEY: I have no personal  
12          or business connection with any of the parties  
13          to the dispute.

14          I'm sitting as an arbitrator, appointed  
15          by the Order of the United States District  
16          Court for the Southern District of New York,  
17          signed December 17, 1973, and affirmed May 16, 1974.

18          In the record of the court is a letter  
19          I wrote to Judge Pierce, stating my qualifications.  
20          Both counsel have seen that letter.

21          I was formerly associated with the  
22          law firm of Haight, Gardner, Poor & Havens,  
23          acting for shipowners. However, I have, for the  
24          past ten years, been on the faculty of  
25          Fordham Law School, and I have severed all

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2 connection with that firm.

3 MR. HARLOW: Professor Sweeney, would  
4 you please be kind enough to tell us what  
5 courses you teach in connection with this?

6 PROFESSOR SWEENEY: Yes, my courses  
7 in the law school, now I teach a course  
8 in admiralty law, international business  
9 transactions, a course in international trade law,  
10 aviation law, tort law.

11 I have formerly taught courses in  
12 bankruptcy, evidence, and criminal law.

13 MR. HARLOW: Thank you.

14 May I also ask that you read from  
15 the letter the qualifications with respect  
16 to the committees?

17 PROFESSOR SWEENEY: Perhaps we can  
18 just copy the letter and put it in.

19 MR. HARLOW: Perfectly all right with me.

20 MR. GREENBAUM: Why don't we do that after  
21 we have closed.

22 MR. HARLOW: And we are referring to  
23 a letter which Professor Sweeney wrote to  
24 Judge Pierce in connection with his qualifications  
25 as a member of the Panel.

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It's dated?

PROFESSOR SWEENEY: December 13, 1973.

MR. HARLOW: Thank you.

THE CHAIRMAN: To the best of my

recollection and knowledge, I have never had any relationships nor have I heard of either the owners of the ISABENA or the charterers involved in this dispute.

I know the firm of Healy & Baillie and have sat and am sitting as a member of the Panel on various arbitrations in which they are interested.

I have also sat in arbitrations in which Mr. Greenbaum has been counsel for one of the parties.

have not arbitrated previously with  
Mr. Harlow.

I frequently sat on the same panel as an arbitrator with Mr. Nelson, whom I have known for many years. This was the first time I have had the pleasure of meeting Professor Sweeney.

I know of no reason which would prevent  
me rendering an unbiased and objective finding  
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3 MR. GREENBAUM: The Panel is acceptable  
4 to the owners.

5 MR. HARLOW: The charterers accept the  
6 Panel for a determination of the issue which  
7 the charterer will raise with respect to  
8 whether or not the charterer is relieved of all  
9 responsibility under specific terms of the  
10 time charter party.

11                   The charterer reserves its approval  
12                   with respect to the Panel with respect to  
13                   any other matters.

14 MR. GREENBAUM: Mr. Harlow, I think it's  
15 up to the charterers to accept or reject  
16 the Panel as to whether or not you have reason  
17 to believe that they are biased or not, and  
18 further whether they qualify as commercial  
19 men within the meaning of the charter party  
20 arbitration clause.

If you have some objection to the substance of what's going to proceed in the arbitration, I don't think that goes to approval of the Panel as such.

25 Perhaps you could clarify for us what  
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2 you think you are reserving.

3 MR. HARLOW: The right to be bound  
4 by a decision made by this Panel with respect  
5 to matters concerning which I am not at present  
6 willing to arbitrate. And I have no way  
7 of protecting myself against the Panel going  
8 forward with the examination of the evidence,  
9 before they have ruled on the issue as to  
10 whether or not the charterer is relieved of  
11 all responsibility under the time charter.

12 MR. GREENBAUM: May I ask, do you accept  
13 the Panel as unbiased?

14 MR. HARLOW: I don't care to answer  
15 that question.

16 MR. GREENBAUM: Do you accept the  
17 Panel as commercial men, within the meaning of  
18 the charter party arbitration clause?

19 MR. HARLOW: I certainly accept the two  
20 nonlaw professors as commercial men.

21 I reserve my judgment with respect  
22 to Professor Sweeney, but only as I have pre-  
23 viously qualified it.

24 May I inquire of the Panel if they  
25 understand my position, because I may not

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have stated it correctly, and I do want you  
to clearly understand what I'm saying.

4

MR. NELSON: I'm a little mystified  
about it.

6

THE CHAIRMAN: Yes, I don't understand it.

7

MR. HARLOW: That's possible.

8

MR. GREENBAUM: I think the mystification  
is justified in the sense that there is no  
legal grounds for a reservation of the sort  
you are making.

12

You may perhaps disagree as to what  
issues the Panel may decide. This has  
already been decided by the District Court  
and the Court of Appeals. Apparently you  
don't agree with me on that.

17

But the point is, this does not go to the  
two questions I've already asked you.

19

MR. HARLOW: May I say, if you are  
mystified, I can understand it, because you  
are taking a very firm position with respect  
to this.

23

But if you are mystified, please let me  
explain it. I don't think you can help me  
at all.

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2 My position is that my clients are  
3 willing to accept this Panel to determine  
4 the basic issue, that is, the issue which we  
5 consider to be basic, but that I do not want  
6 to get involved with this Panel at this point  
7 in going forward with any other evidence, or  
8 with any other matters pertaining.

9                   If I accept the Panel, they can  
10                  make a ruling that I must go forward. That I  
11                  will not accept.

12 | That's my position.

13 MR. GREENBAUM: Then you are, in effect,  
14 disputing the jurisdiction of the Panel, but  
15 not the question & whether they are biased  
16 or whether they are commercial men?

17                   MR. HARLOW: No, I am raising a question,  
18                   which I think must be determined in another  
19                   forum, as to whether or not the Panel, having  
20                   ruled against me on my basic issue, I do not  
21                   then have the right to cease to go forward.  
22                   They can order me to go forward, and if I have  
23                   accepted the Panel, I think technically I  
24                   would be bound to go forward.

25 I am only refusing it on the technicality  
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that I want a definitive ruling on the major point involved in this matter. After that, I would be perfectly happy to go to arbitration.

3

This board may not have the final word on that issue.

4

MR. GREENBAUM: Mr. Harlow, I think I understand your position.

5

MR. HARLOW: Thank you.

6

MR. GREENBAUM: And I think it relates to the substance of the disputes and as to whether the Panel has the jurisdiction to decide all or only a given part of that substance.

7

But I asked you two questions, which you said you preferred not to answer, and which amounts to not accepting the Panel, nor rejecting the Panel, and the two questions have to do with whether you feel they may be biased, and whether you feel they qualify as commercial men within the meaning of the agreement. And I think we have to get that out of the way before we go anywhere.

8

MR. HARLOW: I think I have stated my position perfectly clearly, and I leave it

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2 to the Panel to make a decision as to whether  
3 they will accept it or not.

4 MR. NELSON: I would like to have a talk.

5 THE CHAIRMAN: I think so, too. We would  
6 like to have a few minutes.

7 (Brief recess taken.)

8 THE CHAIRMAN: We consider, pursuant  
9 to Clause 17 in the charter party, and the Order  
10 of the Court, we are already empowered to proceed  
11 to arbitrate any dispute between the parties.

12 We cannot rule at this time on  
13 Mr. Harlow's motion in respect of liability,  
14 without hearing evidence concerning the  
15 dispute.

16 MR. HARLOW: First of all, gentlemen,  
17 and I suppose it's up to me to talk, I don't  
18 consider there to be a dispute.

19 A dispute, as I understand it, for purposes  
20 of commercial arbitration, is a dispute as to  
21 how many tons were delivered, how short was the  
22 cargo, how many employees put in how many hours.

23 The statement which these gentlemen  
24 have prepared, I mean the owners, consists of  
25 a list of financial items for the loss of a

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ship, the loss of a captain, the loss of a  
first mate, and a second mate, and so on down  
the line.

5

There is no dispute about that. We  
agree the ship was lost. We agree that the  
captain was lost. We agree that all the other  
men were lost. We are not disputing that.

9

10

The question we raise is whether or not  
we have any liability in the premises.

11

12

13

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We have a charter party, which was  
signed by the owners and by us, which very  
clearly states, "Nothing herein is to be  
construed as a demise of the vessel to the  
charterers. The owners to remain responsible  
for the navigation of the vessel, insurance, crew,  
and all other matters, same as when trading  
for their own account."

My position is it wouldn't matter  
if we were grossly negligent; we are not liable.  
And I maintain that we are entitled to a  
ruling on this clause before we proceed to  
any other matters.

I bring to your attention --

THE CHAIRMAN: I suggest, Mr. Harlow,  
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you are really talking over our heads, inasmuch  
as we have no knowledge of this case whatsoever.

4

MR. GREENBAUM: May I address that issue?

5

In the District Court, Mr. Harlow and  
his associate counsel, Mr. --

7

MR. HARLOW: May I please, sir,  
interrupt you?

9

Before we have any reference as to  
what happened in the District Court, let us  
argue out our differences here. I don't  
think the District Court is involved in this matter.  
Nobody said anything about the District Court.

14

I have raised an issue under the contract.  
I think it's perfectly proper to argue  
before the Arbitrators that we should go to  
the evidence, but not on the basis of some  
extraneous fact.

19

MR. GREENBAUM: May I have a ruling?

20

May I continue on my line?

21

MR. HARLOW: I object to any reference  
to what has transpired in the court proceedings  
prior to this moment.

24

MR. GREENBAUM: Since the present  
arbitration is the result of a Court Order,

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I think it's perfectly in order to discuss  
what happened and what the Court actually decided.

4

It is my understanding --

5

MR. HARLOW: I would like to be heard  
again on the point.

7

THE CHAIRMAN: When Mr. Greenbaum is  
finished.

9

MR. HARLOW: When he is finished. I thought  
he had assumed he had a ruling on this point.

11

MR. GREENBAUM: It's my understanding  
that the argument between the charterer and  
the District Court was that, as Mr. Harlow  
said, there was no dispute, and therefore  
there was nothing for the Arbitrators to arbitrate.

16

The District Court disagreed --

17

MR. HARLOW: You are presenting exactly  
what I am objecting to your presenting.

19

We must have a ruling on that before  
you proceed.

21

MR. GREENBAUM: May we have a ruling?

22

THE CHAIRMAN: Let me have something to  
say.

24

Professor Sweeney's document here indicates  
there was a dispute.

25

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MR. HARLOW: Are you talking about the  
Court Order, Professor Sweeney?

3

PROFESSOR SWEENEY: Yes.

4

MR. GREENBAUM: By that document, the  
Court Order --

5

MR. HARLOW: May I have a moment, please?

6

MR. GREENBAUM: May I have a moment?

7

MR. HARLOW: I have made an objection  
to your giving this testimony, which is what  
we are doing, and I think we have to get a  
ruling on it.

8

I would like to point out, gentlemen,  
that it doesn't say one word in the Order  
about a dispute, not one word. It says that we  
are ordered to arbitrate, and we are here to  
arbitrate.

9

MR. GREENBAUM: Mr. Webber, may I proceed  
along my line of argument?

10

THE CHAIRMAN: To proceed to arbitration  
of a dispute, which I think is exactly what I  
indicated.

11

MR. HARLOW: I beg your pardon. I am  
reading it quite differently than you are,  
and I apologize for that.

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The word "dispute" is there. I'm sorry.

3

THE CHAIRMAN: I suggest Mr. Greenbaum  
be allowed to proceed, and then you can reply  
to it.

6

MR. HARLOW: Thank you.

7

MR. GREENBAUM: Since the word "dispute"  
is there, perhaps Mr. Harlow will withdraw  
his objection..

10

11

MR. HARLOW: No, I will not withdraw  
my objection.

12

13

14

15

16

17

18

MR. GREENBAUM: In that case, the dispute,  
or the alleged lack of a dispute, was decided  
by the District Court. The District Court  
empowered the Arbitrators to hear the dispute  
which is, in fact, in issue, who, as between  
owners and charterers, is liable for the loss  
of the ISABENA.

19

20

21

22

Whether there is one charter party clause which  
may or may not relieve the charterers, and upon  
which the charterers rely, is a question on  
the merits for the Arbitrators to decide.

23

24

Mr. Harlow may request some sort of  
interim award, a summary judgment motion.

25

The Arbitrators have the discretion to

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grant or deny that. I oppose it, very much so,  
I don't think the Arbitrators can decide  
this case without hearing the evidence.

5

I still haven't had the opportunity to  
present the grounds of the claim, because every  
time I've begun to do so Mr. Harlow has  
interrupted me, and I request permission to  
proceed with that at this time.

10

THE CHAIRMAN: You are requesting a motion  
on that, are you?

12

MR. GREENBAUM: Unless Mr. Harlow objects,  
I will just proceed and describe the grounds  
of the owner's claim.

15

MR. HARLOW: May I be heard?

16

May I have that Order again? I'm sorry.

17

Gentlemen, I'm sorry, I must stick to  
my position. The word "dispute" does not appear  
in the Order. It appears in the preamble.

20

"A petition having been filed by  
Fair Wind, pursuant to the Federal Code, for  
an Order appointing an arbitrator to proceed  
to an arbitration of a dispute."

24

That's an assumption which these  
gentlemen made, which the owner made when they

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1 submitted this. The judge doesn't say  
2 one word about a dispute.  
3  
4 The only words that pertain to the  
5 Judge's Order are contained in those last two  
6 paragraphs, and there is no dispute stated in it.  
7 He has not decided that issue.  
8  
9 But even so, even so.  
10 MR. GREENBAUM: I quite obviously disagree  
11 with your reading of --  
12  
13 MR. HARLOW: I --  
14 MR. GREENBAUM: May I finish a sentence,  
15 Mr. Harlow?  
16 MR. HARLOW: I think you interrupted me,  
17 I'm sorry.  
18  
19 MR. GREENBAUM: If I did, I apologize.  
20 But I don't think I have yet finished a thought  
21 without being interrupted.  
22  
23 MR. HARLOW: I'm waiting. Proceed.  
24  
25 MR. GREENBAUM: Simply that the preamble  
to the Order, as signed by the Judge, is a  
recitation by the Judge of what has gone  
forward in the case.  
26  
27 Quite clearly, the Judge has decided  
28 that there was a dispute. He has empowered the

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2 Panel to decide that dispute.

3 The only conceivable objections that  
4 Mr. Harlow can have a right to raise at the  
5 time would be bias on the part of the Panel

6 Mr. Harlow suggests that he has a right  
7 to raise an objection as to whether Mr. Sweeney  
8 is a commercial man.

I think in acquiescing to the recom-  
mendation by the Court more than a year ago,  
that question is out of the picture now,  
that Professor Sweeney is accepted as a member  
of the Panel by the charterers.

14                   In any event, Mr. Harlow has asked some  
15                   questions of Professor Sweeney. He has accepted  
16                   the professor on the Panel, at least for  
17                   some limited purpose, which I believe goes  
18                   to the substance of the case, certainly not to  
19                   whether the professor is a commercial man or not.

20 I submit that the Panel has been  
21 accepted, necessarily for all purposes,  
22 that they are empowered to decide the dispute  
23 as to who, between owners and charterers,  
24 is responsible and liable for the loss of the  
25 ISABENA, and I would like to proceed with the  
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2 case by stating the owner's grounds for  
3 claiming damages which it claims.

4 MR. HARLOW: Mr. Chairman, may I --

5 THE CHAIRMAN: You are claimant?

6 MR. GREENBAUM: I represent the claimant,  
7 the shipowner.

8                   MR. HARLOW: I will not continue to  
9                   sit in this room if I am not going to be allowed  
10                  to be heard without interruption from this gentle-  
11                  man. I was in the middle of a sentence when  
12                  he started talking that time. He changed  
13                  the subject completely.

14 THE CHAIRMAN: He hadn't finished what  
15 he was saying.

16 MR. HARLOW: Yes, he did.

17 THE CHAIRMAN: Not in my opinion.

18 MR. HARLOW: Sir, he went into an entire  
19 dissertation in this time.

20 THE CHAIRMAN: Your time is now. You  
21 may proceed.

22 MR. HARLOW: The question we were  
23 discussing was whether or not the Judge had  
24 stated there was a dispute between the parties.  
25 He did not so state. He said that there was

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to be arbitration. That's what the Order says.

3

We are here to arbitrate.

4

We maintain, we still maintain, there

5

is no dispute. In their pleading, their

6

initial pleading, they set forth a series of

7

claims. We don't have any argument with

8

them about those claims. If they suffered the

9

losses, they suffered the losses. I am not

10

arguing the point with them.

11

The question is whether or not the

12

charterer has legal responsibility. And I say

13

that the issue of legal responsibility can be

14

determined by this Panel as a matter of law.

15

And that is what I respectfully request the

16

Panel's position to do, is to move that

17

the Panel hear the issue, as between the owner

18

and the charterer, as to whether or not the

19

charterer is not relieved in toto

20

from any responsibility for the losses

21

claimed to have occurred by the terms of the

22

contract. And I respectfully request the Panel

23

to rule on that motion.

24

THE CHAIRMAN: We have ruled on that

25

motion. It's quite clear, in my opinion. We

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cannot recall at this time on Mr. Harlow's motion in respect of liability without hearing evidence covering the dispute.

5

MR. HARLOW: May I point out that you made that ruling without hearing any argument from me, or any briefing by either party with respect to the point.

9

10

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I respectfully request that in the circumstances the hearing be adjourned, that I be permitted to brief this point for the Panel, and then the Panel make a determination as to whether or not we may proceed on this issue alone.

What evidence can they give?

I am conceding that they have a valid claim. The question is whether we are liable for it.

THE CHAIRMAN: I am not asking that. I feel that the Panel should have the evidence before they are asked to make any motions whatsoever.

MR. HARLOW: I am relying on a legal document which is before the Panel, and which I think the Panel must determine, whether it's controlling or not, before I go any further.

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THE CHAIRMAN: Which legal document before  
the Panel?

4

MR. HARLOW: The charter party?

5

THE CHAIRMAN: Yes.

6

MR. GREENBAUM: May I address this entire  
issue?

8

MR. HARLOW: I am making the motion.  
I read the section which I believe controls.

10

Would you mind letting me finish, please?

11

MR. GREENBAUM: I thought you were  
finished, more than once.

13

MR. HARLOW: And I say this very  
clearly, gentlemen, that if you will not rule  
on this, then I want something on the record  
which permits me to go back to the Court and  
get a ruling from the Court as to whether or  
not you must determine this ab initio--  
I mean first.

20

MR. GREENBAUM: Now if I may address  
the issue?

22

Thank you.

23

What Mr. Harlow is asking for is known  
in a court proceeding as summary judgment. It is  
provided for in court by the rules of the court.

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It's a procedural matter.

In an arbitration, the arbitrators have discretion as to the procedure to be followed.

I imagine they do have the discretion to rule on a motion for an interim award, in order to save the time and expense of a number of hearings.

I oppose it in this particular case,  
particularly since the Arbitrators haven't heard  
the grounds that the owner claims.

Even in court, summary judgment cannot be rendered until the Court has heard the grounds of the claim. And if there is a disputed issue of fact, the Court requires evidence, a trial, to decide that issue.

I believe the Arbitrators have ruled, and properly so, that they prefer not to make some sort of a determination as to whether or not summary judgment is in order, but rather that the case should go forward in the ordinary course of arbitration proceedings.

And I ask the Panel to stand by its own ruling.

MANHATTAN REPORTING CORP.

133 HASSAU STREET, NEW YORK 17-3223

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

26

2 MR. HARLOW: Gentlemen, I will not  
3 proceed until there is a final ruling by some  
4 authority that can make a final ruling on  
5 this issue. I maintain if you say you cannot  
6 rule on it, that you cannot rule on it,  
7 which is what you are saying, as I understand it,  
8 then it should go to a Court. A court must  
9 determine whether you have the right to rule  
10 on this or not.

11 THE CHAIRMAN: It's really not the question  
12 of whether we have the right to rule on this.  
13 It's a question that we are not ruling on this  
14 without hearing evidence concerning the dispute.

15 MR. HARLOW: Then I respectfully request  
16 the Panel to reconsider, to give us an  
17 opportunity to brief the issue.

18 It's a matter of contract law in the  
19 admiralty field that we are dealing with here.  
20 Does or does not this contract relieve the  
21 charterers from all responsibility, regardless  
22 of what occurred?

23 Now, I trust you gentlemen would  
24 concede that if I could have a Court ruling  
25 which said because this contract prohibits the  
MANHATTAN REPORTING CORP.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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2 charterers from being held responsible, that  
3 there would be no reason to proceed with this  
4 arbitration. And that is exactly what I'm  
5 asking for in the first place.

6 If I'm wrong, then of course we proceed  
7 with the other matters. But to elect the time  
8 be taken to put in all the evidence, and to befog  
9 the issues, which are not fundamental to this  
10 case, because I'm conceding the claim, I think  
11 is not justice.

12 MR. NELSON: I can see this procedure  
13 very fairly if you both came to us and said,  
14 "Here is the agreed statement of facts."

15 This is what happened. Now, under this  
16 contract, am I liable, or are they liable?"

17 But I just cannot, as a nonlawyer, see  
18 how you can rule on the question of liability  
19 under a contract until you know what happened.

20 MR. HARLOW: I agree with that entirely  
21 from a layman's point of view, absolutely and  
22 completely. But there is such a thing in the  
23 law as a mala prohibita clause. Is there not?  
24 In which the contract says, "No, no, no."

25 And that's what I'm trying to adopt here.

MANHATTAN REPORTING CORP.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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But let me go a little further with that.

3

True, we could have come in with that statement, and I guarantee you that's what I would like to have done.

6

I was served with this last Friday.

7

It was served on Gifford, Woody. This firm has known for at least six months, if not a year, that I haven't been with Gifford, Woody, Carter & Hays. I got it Friday afternoon.

11

Excuse me for this personal note.

12

I happen to be moving. I actually got a chance to discuss this with my clients yesterday afternoon. That's the situation I'm in.

15

We didn't know what their claim was until Friday, when this was served on me.

17

This document, which he proposed as the submission.

19

MR. GREENBAUM: You are under no compulsion to sign that today. We can discuss that in the future.

22

MR. HARLOW: I'm not going to sign it at all. That's not the point.

24

We were accused of trying to delay this matter. The decision of the Court I believe

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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was rendered appointing Professor Sweeney  
the arbitrator on December 17, 1973.

4

We then went to court, but we disagreed  
with the procedure which had been undertaken.

6

The result was that they got a decision that  
we had to arbitrate, and that's a year  
old now, and the basis they got it on was  
that there was a great necessity for speed.

10

My position is that these gentlemen are  
coming in here, looking for a windfall,  
based on evidence which we don't care  
whether it's true or not true. They had the  
loss. We know there was a loss. But we say  
if that vessel sank because somebody put a stick  
of dynamite in it, barring it being me,  
that we are not responsible.

18

And, therefore, we are entitled to a  
ruling.

20

I will also state for the record, because  
I know it's the truth, it's a complicated point  
of view. It's a very complicated point of law.  
Nobody can make a determination on it in  
five minutes, and I don't expect anybody to.

25

But I would like the opportunity to present  
MANHATTAN REPORTING CORP.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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the case, before you go forward with the evidence.

3

If you rule against me then, I have a decision to make. I either go to court, because I think I have a right to go to court on that issue, or we proceed. That is up to my clients.

6

And I think that's a fair proposition.

8

I don't know why you can't concede it.

9

MR. GREENBAUM: May I?

10

MR. HARLOW: Yes, of course.

11

MR. GREENBAUM: Again, the point is that the owners allege that there are certain facts in the case that place the responsibility for this casualty on the charterers. I would like to address those facts, if I may.

16

The vessel was used to lighter another vessel. As I said earlier, the ISABENA was a tween-decker. The lower holds, we allege, were filled. The upper holds, the tween-deck holds, were not filled.

21

MR. HARLOW: I must respectfully object.

22

You are giving testimony.

23

MR. GREENBAUM: No, I am making a statement as to the owner's grounds of claim, and these statements will later be supported by evidence.

MANHATTAN REPORTING CORP.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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MR. HARLOW: Then you are doing exactly  
what I do not intend to participate in, and  
that is a review of the evidence at this point.

5

MR. GREENBAUM: May I continue, Mr. Webber?

6

MR. HARLOW: If he does, I must leave  
the room. I am terribly sorry. I am not  
trying to be fresh, but I must maintain my  
position.

10

These are my instructions from my  
client, and I must follow them out.

12

If you rule against me, then I must go back  
to my clients and say this is the situation,  
the arbitrators have said regardless of my  
position, and I want this record so that I  
can show it to them, exactly what happened  
here, and they say, "Okay, go to court on  
that issue," that's fine.

19

But I will not be in a position  
where I get, excuse the expression, sucked  
into a discussion of facts which do not pertain  
to us in any way.

23

THE CHAIRMAN: I think the Panel better  
have just a few minutes.

25

MR. HARLOW: Thank you.

MANHATTAN REPORTING CORP.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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2 MR. GREENBAUM: May I simply point out  
3 that there is absolutely no right of the sort  
4 that Mr. Harlow is demanding, that is, for a  
5 Court to direct the arbitrators to make a  
6 determination on a summary judgment application.  
7 These points have all been argued in a slightly  
8 different context before, and that context  
9 was that Mr. Harlow's client claimed that  
10 this lack of a dispute, and that this  
11 mala prohibita clause, or whatever specific  
12 clause of the charter party he refers to, as  
13 a matter of law, they said, takes all liabilities  
14 off charterers, and therefore there is no  
15 dispute, therefore nothing to arbitrate.

16 The Court obviously, disagreed with that.

17 They ordered arbitration.

I for one would like to put in the  
Court's opinion and the briefs that were  
submitted in that proceeding so that the matter  
could be clarified for the Panel.

22 Since it's been decided in the one --

23 MR. HARLOW: Please, gentlemen --

**24** MR. GREENBAUM: May I --

25 MR. HARLOW: Gentlemen, please.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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MR. GREENBAUM: Mr. Harlow, may I continue?

3

MR. HARLOW: I shall leave the room now,  
I'm sorry. I am not going to let him continue  
to do this until there is a ruling on it.

6

MR. GREENBAUM: Mr. Harlow, before you  
leave, I would like you to know that I intend  
to make a statement as to the grounds of the  
owner's claim. You are here to rebut it.

10

MR. HARLOW: I will not participate  
in this arbitration on these terms. I am entitled  
to the ruling. I'm not getting it.

13

(Mr. Harlow left the conference room.)

14

THE CHAIRMAN: Would you mind just letting  
us talk about it?

16

Mr. Greenbaum, counsel for the owners,  
left the room, pending further discussion by  
the Panel of Mr. Harlow's motion.

19

(Brief recess taken.)

20

THE CHAIRMAN: The Panel has agreed  
that both counsel should brief Mr. Harlow's  
motion, with the respective briefs to be  
furnished to the Panel on December 22, 1975,  
following which a ruling on the motion will be  
made by December 29, 1975.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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MR. GREENBAUM: May I point out that this

3

is Mr. Harlow's motion. We can't exchange briefs simultaneously because I am still in the dark as to exactly what it is that he is arguing.

6

MR. HARLOW: Gentlemen, I will submit my brief a week before.

8

THE CHAIRMAN: Would that be December 15th?

9

MR. HARLOW: I just want the weekend,

10

that's all.

11

MR. NELSON: The 15th.

12

MR. HARLOW: I will submit it on the 15th.

13

Is that satisfactory?

14

MR. GREENBAUM: That gives me enough time to respond, yes.

16

MR. HARLOW: Does the Panel want copies of the brief at the time that they are served on opposing counsel, or do you want them all together at the end?

20

THE CHAIRMAN: I think we should get them both together on December 22nd.

22

MR. HARLOW: I will submit them to Healy & Baillie, and they will submit them to you.

24

THE CHAIRMAN: I don't think we can proceed with another hearing, until this decision  
MANHATTAN REPORTING CORP.

Exhibit C to Greenbaum Affidavit - Transcript of Hearing Before  
Arbitrators on December 8, 1975

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2           is rendered.

3           MR. HARLOW: Thank you.

4           THE CHAIRMAN: So we will adjourn.

5           (Time noted: 1:45 p.m.)

6

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Exhibit D to Greenbaum Affidavit - Letter from Harry G. Webber,  
Chairman to Respondent's Attorney dated February 27, 1976

OFFICE OF  
**FRANCIS A. MARTIN AND OTTAWAY, INC.**

SHIP SURVEYORS  
MARINE CONSULTANTS AND APPRAISERS

25 BROADWAY  
NEW YORK 10004  
CABLE ADDRESS: PULIMENTO  
TELEX: 235774  
TELEPHONE: DIGBY 4-6486

**FRANK S. MARTIN (1875-1922)**

FOUNDER

**FRANCIS A. MARTIN (1922-1957)**

**WILLIAM T. OTTAWAY (1961-1965)**

HARRY J. OTTAWAY  
LEROY T. KANAPAUX  
HARRY G. WEBBER  
A. DEBOUTHILLIER  
NORMAN C. JENSEN

NEW YORK

February 27, 1976

Harrington Harlow, Esq.  
Counselor at Law  
800 Third Avenue  
New York, N.Y. 10022

RE: S.S. "Isabena"  
Arbitration  
Charter Party dated June 14, 1972

Dear Sir:

Referring to your motion for Summary Judgement for Charterers, before presentation of the claim by the Shipowner, who requested the arbitration, it is the unanimous judgement of the Panel that the motion be denied.

Very truly yours,

Harry G. Webber  
Chairman

HCW:bm

cc: Mr. Lloyd C. Nelson  
Orion & Global Chartering Co., Inc.  
29 Broadway  
New York, N.Y. 10006

cc: Professor Joseph Sweeney  
Fordham Law School  
Lincoln Center  
New York, N.Y. 10023

cc: J.A. Greenbaum, Esq.  
Healy & Baillie  
29 Broadway  
New York, N.Y. 10006

BEST COPY AVAILABLE

Exhibit E to Greenbaum Affidavit - Letter from Respondent's Attorney  
to Arbitrators dated March 4, 1976

HARRINGTON HARLOW  
COUNSELLOR AT LAW  
800 THIRD AVENUE  
NEW YORK, N.Y. 10022

TELEPHONE  
(212) 759-2230

CABLE ADDRESS  
FLAGSHIP NEW YORK

March 4, 1976

Mr. Harry C. Webber  
Francis A. Martin and Ottaway, Inc.  
25 Broadway  
New York, N.Y. 10004

Mr. Lloyd C. Nelson  
Orion & Global Chartering Co., Inc.  
29 Broadway  
New York, N.Y. 10006

Professor Joseph Sweeney  
Fordham Law School  
Lincoln Center  
New York, N.Y. 10023

Re: "S. S. Isabena" Arbitration

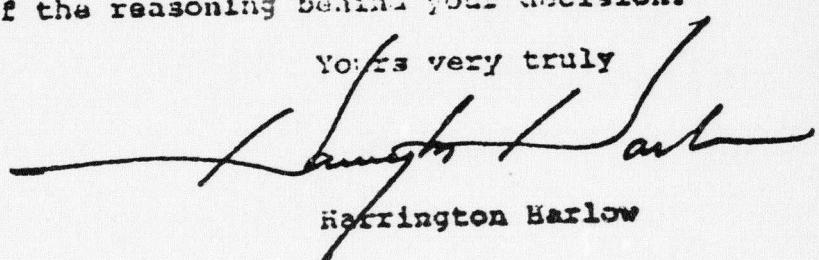
Gentlemen:

This will acknowledge receipt of Mr. Webber's letter of February 27, 1976 advising me of the Panel's unanimous judgment denying Charterer's motion for summary judgment.

Our brief dramatically illustrated the complete failure of Shipowner to cite a single case in point. Shipowner did not even respond to our answering brief or make any show of a legal basis for opposing our position.

In the circumstances we are embarrassed to tell our client of your unexplained decision and write to respectfully request you to advise Charterer of the reasoning behind your decision.

Yours very truly



Harrington Harlow

CC: J. A. Greenbaum, Esq.  
Healy & Baillie  
29 Broadway  
New York, N.Y. 10006

502

Exhibit F to Greenbaum Affidavit - Letter from Harry G. Webber,  
Chairman to Respondent's Attorney dated March 10, 1976

OFFICE OF  
**FRANCIS A. MARTIN AND OTTAWAY, INC.**

SHIP SURVEYORS  
MARINE CONSULTANTS AND APPRAISERS

25 BROADWAY  
NEW YORK 10004  
CABLE ADDRESS: PULIMENTO  
TELEX: 235774  
TELEPHONE: DIGBY 4-6486

FRANK S. MARTIN (1875-1922)

FOUNDER

FRANCIS A. MARTIN (1922-1957)

WILLIAM T. OTTAWAY (1961-1965)

HARRY J. OTTAWAY  
LEROY T. KANAPAU  
HARRY G. WEBBER  
A. DEBOUTHILLIER  
NORMAN C. JENSEN

NEW YORK

March 10, 1976

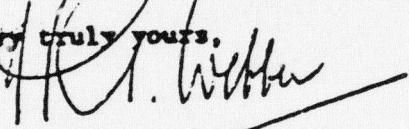
Harrington Harlow, Esq.  
Councillor at Law  
800 Third Avenue  
New York, N.Y. 10022

Dear Sir:

RE: S.S. "ISABELLA"  
Arbitration  
Charter Party dated June 14, 1972

The Panel wishes to confirm receipt of your letter dated March 4, 1976 and in reply may advise that your motion for summary judgment will not be entertained until completion by Shipowner's Counsel of evidentiary presentation of his claim at a further hearing or hearings to be arranged.

Very truly yours,

  
Harry G. Webber  
Chairman

HCW:hm

cc: Mr. Lloyd C. Nelson  
Orion & Global Chartering Co., Inc.  
29 Broadway  
New York, N.Y. 10006

cc: Professor Joseph Sweeney  
Fordham Law School  
Lincoln Center  
New York, N.Y. 10023

cc: J.A. Greenbaum, Esq.  
Healy and Baillie  
29 Broadway  
New York, N.Y. 10006

Exhibit G to Greenbaum Affidavit - Letter from Petitioner's Attorneys  
to Arbitrators dated April 8, 1976

April 8, 1976

Mr. Harry C. Webber  
Francis A. Martin and Ottaway, Inc.  
25 Broadway  
New York, New York 10004

Mr. Lloyd C. Nelson  
Orion & Global Chartering Co., Inc.  
29 Broadway  
New York, New York 10006

Professor Joseph Sweeney  
Fordham Law School  
Lincoln Center  
New York, New York 10023

Re: Arbitration  
"ISABENA"

Dear Sirs:

We have the possibility of producing a witness  
for testimony in New York late in April or in May.  
The witness is a seaman and, of course, it is difficult  
to predict when he will be available again. Therefore,  
we urgently request that the panel set the earliest  
possible hearing date.

Very truly yours,

HARLEY & BAILLIE

JAG:dad

By

Jack A. Greenbaum

cc: Harrington Harlow, Esq.

Exhibit H to Greenbaum Affidavit - Letter from Respondent's Attorney  
to Arbitrators dated April 10, 1976

HARRINGTON HARLOW

COUNSELLOR AT LAW

800 THIRD AVENUE  
NEW YORK, N.Y. 10022

TELEPHONE  
(212) 759-2230

CABLE ADDRESS  
FLAGSHIP NEW YORK

April 10, 1976

Mr. Harry C. Weber  
Francis A. Martin and Ottaway, Inc.  
25 Broadway  
New York, New York 10004

Mr. Lloyd C. Nelson  
Orion & Global Chartering Co., Inc.  
29 Broadway  
New York, New York 10006

Professor Joseph Sweeney  
Fordham Law School  
Lincoln Center  
New York, New York 10023

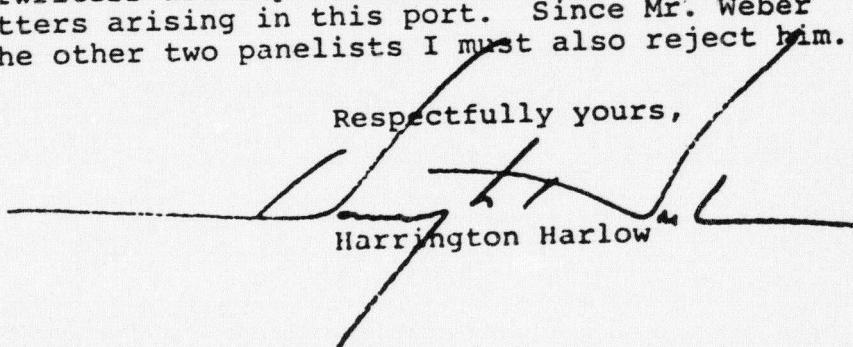
Re: S.S. "ISABENA" - Arbitration

Gentlemen:

I am in receipt of a copy of Mr. Greenbaum's letter to you of April 8, 1976 in which he requests you to set the earliest possible hearing date.

As you will remember at the hearing on December 8, 1975 I made it clear I was accepting the panel only for the purpose of deciding the motion for summary judgment. I must reject the panel for the purpose of making a decision on the facts. Neither Professor Sweeny nor Mr. Nelson are acceptable to me. Professor Sweeny is not a commercial man. Mr. Nelson's firm acts as agents in New York for vessels whose owners and underwriters are represented by Healy & Baillie in admiralty matters arising in this port. Since Mr. Weber was chosen by the other two panelists I must also reject him.

Respectfully yours,

  
Harrington Harlow

HH:h

cc: Jack A. Greenbaum, Esq.

Notice of Motion on Petition to Compel Arbitration  
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x  
In the Matter of the Arbitration :

between : 76 Civ. 2293 (LPM)

FAIR WIND MARITIME CORPORATION, :  
as Owners of the S.S. "ISABENA", :  
Plaintiff, : NOTICE OF MOTION

and :

TRANSWORLD MARITIME CORPORATION, :  
as Charterers, :

Defendant,

Under a Charter Party dated :  
June 14, 1972.-----x  
S I R S:

PLEASE TAKE NOTICE that on the annexed petition, affidavit of Jack A. Greenbaum, sworn to the 24th day of May, 1976, and the accompanying memorandum of law, plaintiff will move this Court at the United States Courthouse, Foley Square, New York, New York 10007, Room 102, before the Honorable Lloyd F. MacMahon, United States District Judge, on the 4th day of June, 1976, at 2:15 o'clock in the afternoon or as soon thereafter as counsel can be heard, for an order and judgment,

a) pursuant to 9 U.S.C. §4, directing the defendant to arbitrate, as previously ordered by the Court;

b) pursuant to F.R. Civ. P. Rule 54(d), awarding to plaintiff its costs and attorneys' fees;

c) pursuant to F.R.Civ.P. Rule 70, and Civil Rule 14, adjudicating the defendant in contempt for its refusal to obey the Court's previous order compelling arbitration, and

## Notice of Motion on Petition to Compel Arbitration

d) pursuant to 28 U.S.C.  
§1927, ordering defendant's counsel,  
Harrington Harlow, to pay plaintiff  
its costs, including attorneys'  
fees, incurred by reason of Mr.  
Harlow's unreasonable and vexatious  
multiplication of the proceedings;  
and for such other, further and different relief as the Court  
may deem just and proper.

Dated: New York, New York  
May 24, 1976

Yours, etc.

*H. Baillie*  
HEALY & BAILLIE  
Attorneys for Plaintiff  
Office & P.O. Address  
29 Broadway  
New York, New York 10006

TO: HARRINGTON HARLOW, ESQ.  
Attorney for Defendant  
800 Third Avenue  
New York, New York 10022

Affidavit of Harrington Harlow, Esq., dated June 1, 1976, in Support of Respondent's Motion for Stay of Hearing of Petitioner's Motion to Compel Arbitration

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of Arbitration :

between :

FAIR WIND MARITIME CORPORATION :  
as Owners of the S.S. "Isabena", :  
Plaintiff, :

76 Civ. 2293 (LFM)

AFFIDAVIT

and :

TRANSWORLD MARITIME CORPORATION, :  
as Charterers, :

Defendant, :

Under a Charter Party dated :  
June 14, 1972 :

STATE OF NEW YORK )  
) ss.  
COUNTY OF NEW YORK )

HARRINGTON HARLOW, being duly sworn, deposes and says:

1) I am an attorney-at-law duly admitted to practice in the Courts of the State of New York and the United States District Court for the Southern District of New York.

2) My office is at 800 Third Avenue, New York  
New York.

3) I am the attorney for the defendants in this matter.

4) This affidavit is submitted in support of defendant's motion for an adjournment of the hearing of a motion to be made by plaintiff before the Honorable Lloyd F. MacMahon, United States District Court Judge, on the 4th day of June at 2:15 o'clock in the afternoon, or as soon as counsel can be heard, and in support of defendant's motion for the granting of a stay of two weeks before the hearing of plaintiff's motion be scheduled. A copy of plaintiff's petition and supporting affidavit is hereto annexed and marked Exhibit A.

Affidavit of Harrington Harlow, Esq., dated June 1, 1976, in Support of Respondent's Motion for Stay of Hearing of Petitioner's Motion to  
5) The plaintiff's motion papers were served upon my office late in the afternoon of May 24, 1976.

6) I left New York City on the morning of May 27, 1976 on a business trip that had been planned long in advance of the receipt of said motion papers from the plaintiff. The trip was for business purposes which were of the utmost urgency and therefore could not be postponed.

7) I did not return to New York City until the morning of June 1, 1976.

8) There is insufficient time to review the documents submitted in support of plaintiff's motion and prepare proper answering affidavits and memorandum of law between today, June 1, 1976 and Friday, June 4, 1976.

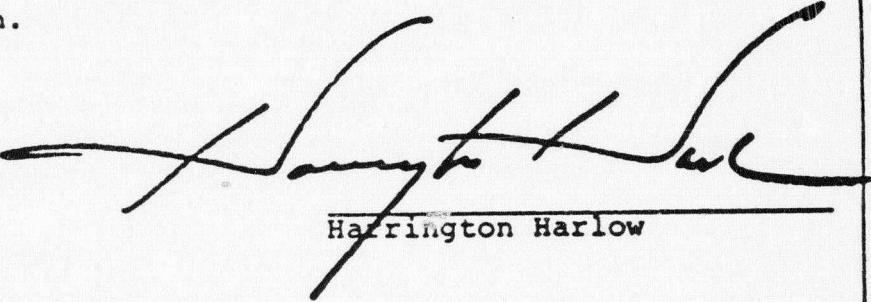
9) Upon receipt of the motion papers a timely request was made of the attorneys for plaintiff for a stipulation granting an extension of time for defendant to respond to the motion, but such request was refused by Jack Greenbaum, Esquire, of Healy and Baillie, Attorneys for plaintiff. The reason given by Mr. Greenbaum for his refusal to stipulate to an extension is that plaintiff desires to expedite matters as they have a witness whom they desire to produce before an arbitration panel and whom they claim shall only be available for such testimony during the month of June. Defendant is willing to agree to any arrangement this Court shall provide for the taking of this or any other witness' testimony before a master or referee to assure that plaintiff shall not be prejudiced in any way by a two-week stay.

10) This motion is being made ex parte because of the closeness of the date set for hearing of plaintiff's motion and in light of the fact that insufficient time presently remains to make timely service upon the plaintiff of a notice of motion with respect to defendant's proposed order.

Affidavit of Harrington Harlow, Esq., dated June 1, 1976, in Support of Respondent's Motion for Stay of Hearing of Petitioner's Motion to Compel Arbitration

11) No prior application has been made to this Court for the relief sought herein.

WHEREFORE, it is respectfully requested of this Court that the hearing of plaintiff's motion, scheduled for the 4th day of June, 1976 be adjourned for a period of two weeks to allow defendant sufficient time to properly prepare its response to plaintiff's motion.



Harrington Harlow

Sworn to before me this  
1st day of June, 1976

Gloria M. Brice  
Notary Public

GLORIA M. BRICE  
NOTARY PUBLIC  
STATE OF NEW YORK  
SARATOGA COUNTY  
Commissioned March 30, 1972

Transcript of Hearing before Hon. Lawrence W. Pierce dated June 4, 1976

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 In re: :

5 Arbitration between :

6 Fair Wind Maritime Corporation, as :  
owners of SS Isabena,

7 Plaintiff, :

8 and 76 Civil 2293

9 Transworld Maritime Corporation, as :  
10 charterers,

11 Defendant. :

12 - - - - - x

13

14 New York, New York  
June 4, 1976 - 10:10 a.m.

15

16 BEFORE:

17 HON. LAWRENCE W. PIERCE,

18 D. J.

19 APPEARANCES:

20 Healy & Baillie  
21 Attorneys for Plaintiff  
BY: Jack Greenbaum, Esq., of Counsel.

22 Harrington Harlow, Esq.  
23 Attorney for Defendant.

24 - - -

25

Transcript of Hearing before Hon. Lawrence W. Pierce dated June 4, 1976

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2 THE CLERK: In re arbitration between Fair Wind  
3 Maritime Corporation and Transworld Maritime Corporation.  
4 Plaintiff ready?

5 MR. GREENBAUM: Plaintiff is ready, your Honor.

6 THE CLERK: Defendant ready?

7 MR. HARLOW: Defendant is ready, your Honor.

8 THE COURT: Mr. Greenbaum, why shouldn't some  
9 adjournment be granted as requested by Mr. Harlow in order  
10 that he might respond to your motion papers?

11 MR. GREENBAUM: Because, your Honor, I imagine  
12 you are aware that this is to enforce a previous arbitration  
13 order that you issued.

14 We have a witness who is available in June.

15 He is a Chinese ship's captain.

16 I first learned of this early in April and on  
17 April 8th I contacted the chairman of the panel and also  
18 wrote letters, the chairman happened to be out of town, and  
19 I had letters delivered to the members of the panel and Mr.  
20 Harlow advising them about this witness and at that time he  
21 said to me to be available in late April or in May. At  
22 that time he was not available in June.

23 Apparently on April 10th Mr. Harlow wrote  
24 to the panel. I did not get a copy of the letter --

25 THE COURT: When will he be available?

Transcript of Hearing before Hon. Lawrence W. Pierce dated June 4, 1976

3

1 eo3

2 MR. GREENBAUM: Now I learn he is available in  
3 June.

4 The response I got, after I filed these papers,  
5 he has a visa, he is ready to go in mid June. I have a  
6 trial beginning June 21st, which will take at least a week.

7 THE COURT: All right.

8 How long do you require, Mr. Harlow?

9 MR. HARLOW: Your Honor, I asked for two weeks  
10 on my moving papers and I am satisfied that I can have my  
11 papers in here a week from today.

12 THE COURT: All right.

13 MR. HARLOW: Thank you, your Honor.

14 THE COURT: Will you have your papers in by  
15 noontime June 11th?

16 MR. HARLOW: Right.

17 THE COURT: I will seek to have a ruling on the  
18 motion which, if in favor of the plaintiff's position, would  
19 allow Mr. Greenbaum to go forward before his trial.

20 Your trial is on the 21st, you say?

21 MR. GREENBAUM: Yes, sir.

22 THE COURT: How long do you think you would be  
23 with that? How long will your witness be?

24 MR. GREENBAUM: Less than a day. One hearing.

25 MR. HARLOW: Your Honor, I regret having to go

Transcript of Hearing before Hon. Lawrence W. Pierce dated June 4, 1976

1       eo4

4

2       into this, but this is the heart of the matter, and if we  
3       lose in this court, my clients may decide to appeal.

4                  I would, therefore, suggest that his witness  
5       be examined before a referee or anybody else whom your Honor  
6       selects so that if we do reach this impasse, he will not  
7       be prejudiced in any way by this loss of time.

8                  THE COURT: The difficulty with that, as I see  
9       it, is that there is an outstanding order by which a panel  
10      exists. They are duly constituted and have been involved  
11      with the case.

12                 They should be the ones to whom you should  
13      present your request for some alternative method of pre-  
14      serving the testimony of this witness, whether it is by  
15      videotape or deposition or what have you, rather than myself.

16                 I would suggest that to the extent that you  
17      wish to move that issue, you seek to do it before the  
18      panel.

19                 MR. HARLOW: Your Honor, that becomes a little  
20      difficult at this point because I have asked the panel to  
21      step down.

22                 THE COURT: That is the difficulty, I think,  
23      with your position, Mr. Harlow, is that ontologically  
24      speaking that may be so, but the fact of the matter is that  
25      there exists a duly constituted panel. We can't write that

Transcript of Hearing before Hon. Lawrence W. Pierce dated June 4, 1976

1 eo5

5

2 out. We can't act like that is not so.

3 Again, that reality, recognizing that you may  
4 reserve at any time to appear and proceed with whatever  
5 rights you think you are entitled to, I think you will have  
6 to deal with them.

7 MR. HARLOW: May I just say a word about them,  
8 your Honor?

9 THE COURT: Yes.

10 MR. HARLOW: So far I think with respect to this  
11 panel they are not properly constituted because one of them  
12 I consider to be a non-commercial man, that is the professor,  
13 and I consider another one of the gentlemen to be, and I  
14 do not say this offensively, prejudiced.

15 I am now in a position where I have asked these  
16 gentlemen to withdraw and I have had no word from them  
17 whatsoever in answer to that request.

18 Your Honor, I will only take one more second.

19 If my clients go forward before the panel with this  
20 witness, then I think I am doomed. Then I have got to go  
21 before this panel all the way.

22 I think the issue as to whether or not I am en-  
23 titled to go to another panel should be determined first.

24 THE COURT: That is another matter, which I will  
25 have to wait to hear more about. Get the papers in as per

Transcript of Hearing before Hon. Lawrence W. Pierce dated June 4, 1976

6

2       this schedule and I will try to get out a decision on it  
3       quickly.

4                    MR. GREENBAUM: Just in response to Mr. Harlow's  
5       statement that he hasn't had a response to his request that  
6       the panel step down, in fact he did raise certain objections  
7       at the first hearing and the panel declined to step down  
8       at that hearing in so many words.

9                    I was just looking for the page in the transcript.  
10      It is in there. The chairman consulted with his fellow  
11      members and they decided they were duly constituted to  
12      decide the case.

13                  THE COURT: All right. Follow that schedule  
14      rigidly and I will hope to get the decision out in a timely  
15      fashion.

16                  Thank you.

17                  MR. GREENBAUM: Thank you, your Honor.

18                  MR. HARLOW: Thank you, your Honor.

19

20                  - - -

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Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition  
to Motion to Compel Arbitration

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration :  
between :  
FAIR WIND MARITIME CORPORATION, : 76 Civ. 2293 (LWP)  
as Owners of the S.S. "ISABENA", :  
Plaintiff, : AFFIDAVIT  
and :  
TRANSWORLD MARITIME CORPORATION, :  
as Charterers, :  
Defendant, :  
Under a Charter Party dated :  
June 14, 1972. :  
\_\_\_\_\_  
STATE OF NEW YORK )  
                      ) ss:  
COUNTY OF NEW YORK )

HARRINGTON HARLOW, being duly sworn, deposes and says:

1. I am the attorney for the defendant in this matter, and am familiar with the prior proceedings herein.
2. This affidavit is submitted in opposition to plaintiff's motion for an order and judgement,

- a) pursuant to 9.U.S.C. §4,  
directing the defendant to  
arbitrate,
- b) pursuant to F.R. Civ. P.  
Rule 54(a), awarding to  
plaintiff its costs and  
attorney's fees;
- c) pursuant to F.R. Civ. P.  
Rule 70, and Civil Rule 14,  
adjudicating the defendant in  
civil contempt for its refusal  
to obey the court's previous  
order compelling arbitration,  
and

Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition  
to Motion to Compel Arbitration

d) pursuant to 28 U.S. §1927,  
ordering defendant to personally  
pay plaintiff its costs, includ-  
ing attorney's fees, allegedly  
incurred by reason of deponent's  
"unreasonable and vexatious  
multiplication" of the proceedings;

and in support of defendant's countermotion for an order discharging all three  
arbitrators in this proceeding.

AS TO PLAINTIFF'S FIRST MOTION  
(marked Paragraph 2(a) in the  
affidavit of Mr. Jack Greenbaum  
in support of plaintiff's motions)

3. Defendant does not oppose arbitration in this matter but  
does oppose arbitration before the presently constituted panel.

AS TO PLAINTIFF'S SECOND AND THIRD MOTIONS  
(marked Paragraph 2(b) and 2(c) in  
Mr. Greenbaum's affidavit)

4. Defendant opposes plaintiff's motion for an order pursuant  
to F.R. Civ. P. Rule 54 (d), awarding plaintiff its costs and attorney's fees,  
and pursuant to F.R. Civ. P. Rule 14, adjudicating the defendant in civil contempt.

5. Plaintiff, in the affidavit of Jack A. Greenbaum in  
support of its motion, sets out an alleged "history of defendant's obstructive  
maneuvers." From this recital of events plaintiff would have this Court  
believe that the sole motive of defendant's actions has been to frivolously  
obstruct and multiply proceedings in this matter.

6. It is respectfully submitted that deponent's actions as  
defendant's counsel and defendant's actions manifest a thorough, proper and  
good faith effort to protect defendant's rightful interests.

On September 23, 1973, defendant filed a motion "to alter  
or amend" the decision that had been handed down by Judge Pierce granting  
plaintiff's petition to compel arbitration. Defendant moved to have the matter

Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition  
to Motion to Compel Arbitration

referred for trial, asserting that the legal questions involved are of such a complicated nature that they should not be left to the decision of "commercial men", but should be decided by a court of law in a duly constituted jury trial. Though the motion was denied, Judge Pierce, in his memorandum opinion, explicitly acknowledged the propriety of this motion: "... in denying petitioner's application for attorneys' fees, the Court notes that the motion of respondent, while not sustained, raises issues which are not deemed frivolous." See Judge Pierce's memorandum opinion, annexed as Exhibit A to Jack Greenbaum's affidavit, verified on May 24, 1976, p. 7.

7. Thereafter defendant filed a timely notice of appeal from Judge Pierce's order compelling arbitration, and this appeal was heard and decided on May 16, 1974. The decision went against defendant.

More than a year and a half passed before the first hearing by an arbitration panel was convened. Plaintiff is now asserting that defendant has attempted to stall and obstruct the "expeditious resolution" of this matter; yet it was only through the prodding of Mr. Harry Webber, Chairman of the arbitration panel, after more than a year of indifference and inaction on the part of the plaintiff, that the first hearing occurred. A copy of Mr. Webber's letter to the parties is annexed hereto as Exhibit I.

8. This hiatus was not the first instance in which plaintiff allowed the passage of a considerable length of time before going forward: Eleven months elapsed between the sinking of the S.S. "ISABENA" on July 4, 1972 and the written demand by plaintiff for arbitration, dated June 7, 1973. In light of these two spans of time totalling more than two and a half years, deponent respectfully submits it is ironic and hypocritical that plaintiff should now claim defendant to be intentionally and "vexatiously" delaying the proceedings.

AS TO PLAINTIFF'S FOURTH MOTION  
(marked Paragraph 2 (d) in  
in Mr. Greenbaums affidavit)

9. Plaintiff's fourth motion to charge deponent with the costs because of his "vexatious and unreasonable multiplication of proceedings" is simply out of order. This position of course rests upon the entire contents

Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition to Motion to Compel Arbitration

of this affidavit including both the preceding and subsequent paragraphs thereof.

10. The first hearing before the appointed panel of arbitrators was held on December 8, 1975. From the outset deponent stated defendant's position with respect to the panel:

"The Charterers accept the Panel for determination of the issue which the charterer will raise with respect to whether or not the charterer is relieved of all responsibility under specific terms of the time charter party.

The Charterer reserves its approval with respect to other matters." See Exhibit C of Mr.

Greenbaum's affidavit, p. 7.

Defendant sought a determination by the panel as to whether or not, as a matter of law, the charter party absolved the charterer of any liability in this action. A determination was sought prior to commencement of the arbitration proceeding and the hearing of evidence by the panel, and deponent persisted in his argument that the panel must first consider his motion requesting such determination, as it was defendant's firm belief that it was rightfully entitled to the hearing of such a motion before going forward with an arbitration.

11. It was upon this belief that deponent refused to proceed to arbitration, and it was upon this ground that deponent made this allegedly "unprecedented maneuver" of leaving the conference room (Exhibit C of Mr. Greenbaum's affidavit, pp. 30-33). Plaintiff has submitted that deponent's refusal to proceed until his motion was entertained by the panel constitutes contempt of the panel and the Court's order compelling arbitration. In response it is respectfully submitted that the panel itself did not find defendant in contempt but rather chose to hear the motion and requested both parties to submit briefs. The panel's decision to entertain the motion

Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition  
to Motion to Compel Arbitration

demolishes plaintiff's contention that there was anything contemptuous about deponent's conduct and sustains defendant's claim that it was entitled to such a pre-arbitration determination.

12. On February 27, 1976 the Panel denied defendant's motion without written explanation or opinion. On March 4th, deponent, in light of the complexity of the issue involved, requested written explanation of the basis of the decision. It is submitted such a request is a normal response to the delivery of a decision on a complicated point of law without any explanation as to the reasoning by which the deciding body arrived at its result.

13. On April 10, 1976 deponent wrote to the panel challenging the arbitrators' competency. Defendant had reserved this right quite explicitly at the December 10th hearing, as evidenced by the colloquy found at pages 7-10 of the transcript, annexed as Exhibit C to Mr. Greenbaum's affidavit. Mr. Greenbaum, in his affidavit, states he did not receive a copy of deponent's letter of April 10th, and implies that deponent wilfully purposefully failed to send him a copy of this letter. On investigation of deponent's routine for the day in question it is conceded the letter was not mailed to Mr. Greenbaum. However, defendant's failure to send Mr. Greenbaum a copy was the result of an oversight of a newly-hired and inexperienced secretary in deponent's office, and was in no way a conscious attempt to deceive the plaintiff or deprive Mr. Greenbaum of a relevant document. It is further submitted that plaintiff was not prejudiced by this oversight, as Mr. Webber, the Chairman of the panel, was not available to consider the letter until he returned from abroad on or about the 10th of May and it appears that Mr. Webber must have immediately communicated with Mr. Greenbaum and, upon learning that Mr. Greenbaum had not received a copy, the Chairman promptly forwarded a copy to him. The actual loss of time to Mr. Greenbaum from this oversight could not have been more than twenty-four hours.

14. Mr. Greenbaum alleges that defendant's rejection of the panel in the April 10th letter was simply an attempt to frustrate plaintiff's ability to produce its main witness. In his affidavit in support of defendant's motion for a stay of the hearing of plaintiff's present motion (a copy of this affidavit being hereto annexed as Exhibit II), deponent

Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition  
to Motion to Compel Arbitration

asserted defendant's willingness to have the testimony of this or any other witness taken before Judge Pierce or before a master or referee to assure that plaintiff would not be prejudiced either by a stay of the hearing of that motion or by defendant's challenge of the competency of the arbitrators. Deponent here reasserts defendant's readiness to agree to such arrangement as this Court may provide, and denies any allegation that the rejection of the panel at this time is merely a ploy to deprive plaintiff of the opportunity to present evidence. The rejection is the exercise of defendant's right to object to arbitrators whom it feels are incompetent to act in this matter.

AS TO DEFENDANT'S COUNTERMOTIONS  
(as described in Paragraph 2, *supra*)

15. Defendant has in no way waived objection to the panel. Specifically with respect to Professor Sweeney, plaintiff alleges that by waiting until the first hearing to voice its objection defendant has somehow ceded its right to challenge his competency. As there had been no meeting with the panel prior to the December 10th session, it was proper and timely for defendant to reserve its approval of Professor Sweeney at that time. And deponent did specifically and particularly reserve such approval at that meeting (See Exhibit C of Mr. Greenbaum's affidavit, p. 8) on the grounds that Professor Sweeney is not a "commercial man" as required by clause 17 of the charter party: "The Arbitrators shall be commercial men." A copy of Professor Sweeney's letter of December 13, 1973 to Judge Pierce stating his qualifications and experience is hereto annexed as Exhibit III. Though the letter demonstrates a distinguished career in the academic field of maritime law, there is no evidence of actual commercial experience, and it is on that basis that defendant rejects Professor Sweeney as an arbitrator.

16. In its memorandum of law accompanying Mr. Greenbaum's affidavit in support of plaintiff's motions, plaintiff alleges that "defendant has not bothered to go to Court" to challenge and disqualify the arbitrators, but merely has refused to arbitrate. Such allegation ignores the fact that deponent's letter of April 16th was its formal statement of the unacceptability of all of the arbitrators. By not making a specific demand at that time that the arbitrators step down, defendant was allowing the

Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition to Motion to Compel Arbitration

opportunity for them to voluntarily resign. In any event, only upon their refusal to do so must a party proceed to petition the court, as defendant now does, for removal of the arbitrators. Plaintiff's statement is therefore pre-mature, as it does not make allowance for defendant's proper application to the panel to withdraw from this case of their own record.

17. On June 7, 1976 defendant arranged for hand delivery to each of the arbitrators of a letter in which deponent on behalf of the defendant made formal demand that all of the arbitrators resign. A copy of this letter is hereto annexed as Exhibit IV. Said letter contained a request that deponent be advised of the arbitrators' decision by the close of business on June 9, 1976. Defendant has been informed of their refusal to resign. Defendant therefore now moves that the three arbitrators presently constituting the Panel in the arbitration pending between the parties be dismissed by this Court on the grounds that:

(a) In the case of Mr. Lloyd C. Nelson, his firm acts as agents in New York for vessels whose owners and underwriters are represented with regularity by Healy & Baillie, attorneys for plaintiff, in admiralty matters arising in this port,

(b) In the case of Professor Sweeney, he is not a commercial man as required under clause 17 of the time charter party, and

(c) In the case of Mr. Harry C. Webber, he is the selection of the other two arbitrators.

18. Plaintiff misstates the actual situation in alleging defendant has contemptuously refused to arbitrate in direct and frivolous disregard of this Court's prior order. Defendant has at no time, by statement or action, given any reason to suggest that it will not proceed should its motion be denied. Defendant has justifiably pursued its right to have certain issues determined prior to arbitration, issues which Judge Pierce has acknowledged are not frivolous. Defendant simply refused to be railroaded by plaintiff through an arbitration before the existing panel in

Affidavit of Harrington Harlow, Esq., dated June 10, 1976, in Opposition  
to Motion to Compel Arbitration

advance of the adequate and unharried pre-arbitration determination of the issues presented. When viewed in light of the lengthy delays in which plaintiff has indulged before acting, it can hardly be said that defendant has "vexatiously" obstructed the expeditious resolution of the matter by pursuing these issues.

WHEREFORE, it is respectfully submitted that this Court should deny plaintiff's motions for an order and judgment directing defendant to proceed to arbitration before the present panel of arbitrators and for an order holding defendant in civil contempt and compelling defendant and deponent personally to pay plaintiff its costs including attorneys' fee, and it is further submitted that this Court should dismiss the existing panel of arbitrators.

Harrington Harlow

Sworn to before me this  
17 day of June, 1976

John M. Tamm  
Notary Public, State of New York  
No. 5450-23  
Commissioned in New York County 1/1  
Commission Expires March 30, 1977

Exhibit I to Harlow Affidavit - Letter from E.G. Webber to Attorneys  
for Parties dated June 20, 1975

## OFFICE OF

**FRANCIS A. MARTIN AND OTTAWAY, INC.**

SHIP SURVEYORS  
MARINE CONSULTANTS AND APPRAISERS

28 BROADWAY  
NEW YORK 10004  
CABLE ADDRESS: PULIMENTO  
TELEX: 238774

TELEPHONE: DIGBY 4-6466

**FRANK S. MARTIN (1878-1922)**

FOUNDER

**FRANCIS A. MARTIN (1922-1957)**

WILLIAM T. OTTAWAY (1901-1968)

HARRY J. OTTAWAY  
LEROY T. KANAPAUW  
HARRY G. WEBBER  
A. DESBOUTINNIER  
NORMAN C. JENSEN

SL6192 NUNJ

NEW YORK

June 20, 1975

Nicholas T. Healy, Jr., Esq.  
Healy & Baillie  
29 Broadway  
New York, New York 10006

Harrington Harlow, Esq.  
Gifford, Woody, Carter & Hays  
14 Wall Street  
New York, New York 10005

Re: S. S. "ISARENA"  
Charter Party  
Dated June 14, 1972

Gentlemen:

Since a considerable time has elapsed since the formation of the Panel, we would like to hear whether or not it is the intention of the disputants to proceed to arbitration. If the answer is in the affirmative, please let us have some idea as to when we may expect a request to set up a date for the initial hearing.

Thanking you for your cooperation.

Yours sincerely,

E. G. Webber

BOW:mcf

CC: Lloyd C. Nelson,  
Orion & Global Chartering Co., Inc.  
29 Broadway  
New York, New York 10006

EXHIBIT I

CC: Professor Joseph Sweeney  
Fordham Law School  
Lincoln Center  
New York, New York 10023

BEST COPY AVAILABLE

Exhibit II to Harlow Affidavit - Affidavit of Harrington Harlow, Esq.  
dated June 10, 1976 in Support of Motion for Stay of Hearing

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of Arbitration :  
between : 76 Civ. 2293 (LFM)  
FAIR WIND MARITIME CORPORATION :  
as Owners of the S.S. "Isabena", :  
Plaintiff, :  
and :  
TRANSWORLD MARITIME CORPORATION, :  
as Charterers, :  
Defendant, :  
Under a Charter Party dated :  
June 14, 1972 :  
STATE OF NEW YORK )  
                      ) ss.  
COUNTY OF NEW YORK )

AFFIDAVIT

HARRINGTON HARLOW, being duly sworn, deposes and  
says:

- 1) I am an attorney-at-law duly admitted to practice in the Courts of the State of New York and the United States District Court for the Southern District of New York.
- 2) My office is at 800 Third Avenue, New York New York.
- 3) I am the attorney for the defendants in this matter.
- 4) This affidavit is submitted in support of defendant's motion for an adjournment of the hearing of a motion to be made by plaintiff before the Honorable Lloyd F. MacMahon, United States District Court Judge, on the 4th day of June at 2:15 o'clock in the afternoon, or as soon as counsel can be heard, and in support of defendant's motion for the granting of a stay of two weeks before the hearing of plaintiff's motion be scheduled. A copy of plaintiff's petition and supporting affidavit is hereto annexed and marked Exhibit A.

Exhibit II to Harlow Affidavit - Affidavit of Harrington Harlow, Esq.  
dated June 10, 1976 in Support of Motion for Stay of Hearing

5) The plaintiff's motion papers were served upon my office late in the afternoon of May 24, 1976.

6) I left New York City on the morning of May 27, 1976 on a business trip that had been planned long in advance of the receipt of said motion papers from the plaintiff. The trip was for business purposes which were of the utmost urgency and therefore could not be postponed.

7) I did not return to New York City until the morning of June 1, 1976.

8) There is insufficient time to review the documents submitted in support of plaintiff's motion and prepare proper answering affidavits and memorandum of law between today, June 1, 1976 and Friday, June 4, 1976.

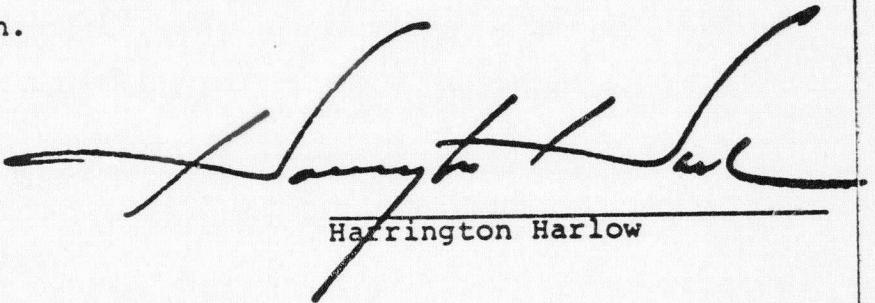
9) Upon receipt of the motion papers a timely request was made of the attorneys for plaintiff for a stipulation granting an extension of time for defendant to respond to the motion, but such request was refused by Jack Greenbaum, Esquire, of Healy and Baillie, Attorneys for plaintiff. The reason given by Mr. Greenbaum for his refusal to stipulate to an extension is that plaintiff desires to expedite matters as they have a witness whom they desire to produce before an arbitration panel and whom they claim shall only be available for such testimony during the month of June. Defendant is willing to agree to any arrangement this Court shall provide for the taking of this or any other witness' testimony before a master or referee to assure that plaintiff shall not be prejudiced in any way by a two-week stay.

10) This motion is being made ex parte because of the closeness of the date set for hearing of plaintiff's motion and in light of the fact that insufficient time presently remains to make timely service upon the plaintiff of a notice of motion with respect to defendant's proposed order.

Exhibit II to Harlow Affidavit - Affidavit of Harrington Harlow, Esq.  
dated June 10, 1976 in Support of Motion for Stay of Hearing

11) No prior application has been made to this Court  
for the relief sought herein.

WHEREFORE, it is respectfully requested of this Court  
that the hearing of plaintiff's motion, scheduled for the 4th  
day of June, 1976 be adjourned for a period of two weeks to  
allow defendant sufficient time to properly prepare its response  
to plaintiff's motion.



Harrington Harlow

Sworn to before me this  
1st day of June, 1976

Gloria M. Bright  
Notary Public

GLORIA M. BRIGGS  
Notary Public  
State of New York  
Suffolk County  
Commissioned March 30, 1978

Exhibit III to Harlow Affidavit - Letter from Professor Joseph C. Sweeney to Judge Pierce dated December 13, 1973

December 13, 1973

The Honorable Lawrence Pierce  
Judge of the United States District Court  
for the Southern District of New York  
United States Court House  
 Foley Square  
New York, New York 10007

Dear Judge Pierce:

Pursuant to our telephone conversation of yesterday afternoon concerning my qualifications and experience in the maritime industry to serve as an arbitrator in a maritime dispute, I offer the following information.

I received my law degree at Boston University in 1957 and then served in the Judge Advocate General's Corps of the United States Navy from 1957 to 1962 during part of which time I was assigned to work as an Admiralty Claims Officer. I obtained the LL.M. in International Law from Columbia University in 1963 and thereafter I was associated with the law firm of Haight, Gardner, Poor & Havens, One State Street Plaza, N.Y., N.Y. 10004 from February, 1963 to September, 1963 during which time I worked with the late Charles S. Haight, specializing in Admiralty Law. Since September, 1966 I have been a member of the Faculty of Fordham Law School. During the academic year 1972-3 I was on leave from Fordham, serving as the Emory S. Land Professor of Merchant Marine Affairs at the U. S. Naval War College, Newport, R.I.

I have taught Maritime Law and International Trade Law (in addition to other courses) for the past seven and one half years. I have served as United States Representative to the United Nations Commission on International Trade Law, Conferences on Merchant Shipping Legislation, for the past three years. I am a member of the Bill of Lading Committee of the Maritime Law Association, the International Transportation Committee of the American Bar Association's Section on International Law, the Law of the Sea Panel of the American Society of International Law, and I am a member of the Editorial Board of the "Journal of Maritime Law and Commerce."

Very truly yours,

EXHIBIT III

Joseph C. Sweeney  
Professor of Law

Exhibit IV to Harlow Affidavit - Letter from Harrington Harlow, Esq. to Arbitrators dated June 7, 1976

June 7, 1976

Mr. Harry C. Webber  
Francis A. Martin and Ottaway, Inc.  
25 Broadway  
New York, New York 10004

Mr. Lloyd C. Nelson  
Orion & Global Chartering Co., Inc.  
29 Broadway  
New York, New York 10006

Professor Joseph Sweeney  
Fordham Law School  
Lincoln Center  
New York, New York 10023

Re: S.S. "ISABENA" Arbitration

Gentlemen:

For the reasons stated in my letter of April 10, 1976 I respectfully request you to resign as arbitrators in the above entitled matter and to advise me of your action to reach me by the close of business Wednesday, June 9, 1976.

My reason for the request that I be told of your decision by Wednesday is that a motion is pending in the Southern District relative to this arbitration and it is imperative that I be able to inform the Judge of your decision by 12:00 noon on Friday June 11, 1976.

Yours very truly,

Harrington Harlow

HH/sr  
cc: Jack A. Greenbaum

EXHIBIT IV

Letter of Jack A. Greenbaum, Esq., to Judge Pierce dated June 11, 1976, in Support of Petitioner's Motion to Compel Arbitration

HEALY & BAILLIE

29 BROADWAY

NEW YORK, N.Y. 10006

NICHOLAS J. HEALY  
ALLAN A. BAILLIE  
RICHARD T. O'CONNELL  
THOMAS L. ROHRER  
SIHUS C. COOK  
NICHOLAS J. HEALY, JR.  
BRUCE A. MCALLISTER  
RAYMOND A. O'CONNELL  
JOHN C. KOSTER

WILLIAM F. LOSQUADRO  
JACK A. GREENBAUM  
JOHN P. McMAHON  
GLEN T. OXTON  
EDWARD J. MILLER

June 11, 1976

H. VICTOR CRAWFORD  
WILLIAM O. KAELIN  
COUNSEL

WHITEHALL 3-3880  
AREA CODE 212  
CABLE ADDRESS MAINBRACE  
TELEX 482088  
TWX 710 581-8100

Ron. Lawrence W. Pierce  
United States District Judge  
United States District Court  
U.S. Courthouse  
Foley Square  
New York, New York 10007

Re: In the Matter of the Arbitration  
between FAIR WIND MARITIME CORPORATION,  
as Owners of the S.S. "ISABENA",  
and TRANSWORLD MARITIME CORPORATION,  
as Charterers. 76 Civ. 2293 (LWP)

Dear Sir:

Although we maintain our position that the defendant has waived the right to challenge the arbitrators and further that the Court lacks jurisdiction to address that issue at this time, we respectfully call the Court's attention to a case pertinent to Mr. Nelson's status as an arbitrator. In Texas Eastern Transmission Corporation vs. R. L. Barnard, 177 F. Supp. 123 (D. Ky. 1959), it was held that there was no showing of "evident partiality" where the counsel for a party to the arbitration was also the counsel for a bank of which one of the arbitrators was an officer.

We also oppose taking any deposition outside of the arbitrators' presence. The purpose of having men knowledgeable about the maritime industry and its law includes their asking questions and satisfying themselves concerning any issues of fact which counsel's examination might leave open. Additionally, the Panel should have the opportunity to observe, judge and compare the credibility of the witnesses on both sides. Indeed, plaintiff has already submitted a written statement by the witness in question. Therefore, a deposition outside of the arbitrators' presence would serve plaintiff no additional

Letter of Jack A. Greenbaum, Esq., to Judge Pierce dated June 11,  
1976, in Support of Petitioner's Motion to Compel Arbitration

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purpose. Plaintiff is not required to bring a witness  
from China solely to give the defendant the opportunity  
to cross-examine.

Very truly yours,  
HEALY & BAILLIE

JAG:dad

By

Jack A. Greenbaum

✓cc: Harrington Harlow, Esq.

Endorsement Order of Judge Pierce, dated June 16, 1976

Closed

In the Matter of the Arbitration between FAIR WIND  
MARITIME CORPORATION and TRANSWORLD MARITIME CORPORATION,  
76 Civ. 2293

ENDORSEMENT ORDER

The plaintiff in this action seeks an order compelling the defendant to proceed to arbitration in accordance with the order of this Court dated December 17, 1973 granting plaintiff's earlier application for an order compelling arbitration and appointing an arbitrator herein. The defendant opposes the application on the ground that it has objected to the arbitration panel. Defendant has also made a cross-motion for disqualification of the panel.

The threshold issue to be addressed is whether the defendant's application to disqualify the panel can properly be raised before the Court at this time. Having reviewed the relevant authority, it is the view of this Court that it cannot.

The cases in this Circuit have uniformly held that an effort to have an allegedly impartial or unqualified arbitrator step down, should he decline to do so at the request of the objecting party, will be reviewable by a district court only after an award has been made. See Sanko S.S. Co. Ltd. v. Cook Industries, Inc., 495 F.2d 1260, 1264 n.4 (2d Cir. 1974); Catz Am. Co. v. Pearl Grange Fruit Exch., 292 F.Supp. 549, 551 (S.D.N.Y. 1968); Petition of Dover S.S. Co., 143 F.Supp. 738, 742 (S.D.N.Y. 1956); Albatross S.S. Co. v. Manning Bros., 95 F.Supp. 459 (S.D.N.Y. 1951); San Carlo Opera Co. v. Conley, 72 F.Supp. 825, 833 (S.D.N.Y. 1946), aff'd, 163 F.2d 310 (2d Cir. 1974). In effect, these cases have held that the objecting party's remedy under 9 U.S.C. §10 is exclusive.

Endorsement Order of Judge Pierce, dated June 16, 1976

76 Civ. 2293 (cont.)

Defendant's reliance on dicta in the San Carlo Opera Co. opinion of Judge Leibell to the effect that a district court may make a substitution of arbitrators before the arbitration has commenced is unavailing. First, defendant has cited no case which has followed or applied this rule and the court has found none. Second, subsequent cases, cited supra, have stated the general rule set forth above without qualification, one in the factual context of a case where the third arbitrator had not yet been appointed. See Albatross S.S. Co. v. Manning Bros., Inc., supra. And finally, even if the rule were as defendant contends, we would hold in the circumstances of this case that the arbitration has commenced. The panel has held one hearing, and, although it was prevented from actually taking testimony by defendant's refusal to remain in the hearing room, it was accepted by both parties for the purpose of deciding a motion for summary judgment. The panel considered and denied that motion.

For the reasons stated hereinabove, the Court rules that the defendant's motion to disqualify the arbitrators is not properly raised at this time and that motion is therefore denied. Objections to the panel appear to constitute the defendant's only reason for refusing to go forward with the arbitration at this time. The Court grants the plaintiff's application for an order pursuant to 9 U.S.C. §4 compelling the defendant to proceed to arbitration. The Court does not reach the question of whether the objections raised by the defendant to the arbitrators on the panel would constitute a valid basis for relief at such time as the claims may properly be raised. Nor does the Court rule with respect to plaintiff's contention that in submitting its motion for summary judgment to the arbitration panel the defendant waived any right it might have to object to the composition of the panel.

## Endorsement Order of Judge Pierce, dated June 16, 1976

76 Civ. 2293 (cont.)

Plaintiff has also moved for various punitive relief against the defendant including an award of counsel fees and costs to the plaintiff and an order holding the defendant in contempt, for its allegedly willful efforts to circumvent this Court's earlier order compelling arbitration and to delay these proceedings. Having reviewed the facts with respect to the conduct of this matter to date, the Court is unable to conclude that the plaintiff has been so diligent in pursuing its rights or the defendant so dilatory in its approach to this matter that such punitive relief is warranted at this point.

The plaintiff's motion for an order compelling arbitration is granted. The plaintiff's application is denied in all other respects. The defendant's cross-motion to disqualify the arbitration panel is denied.

SO ORDERED.

Dated: New York, New York  
June 16, 1976

*lwp*  
\_\_\_\_\_  
LAWRENCE W. PIERCE  
U. S. D. J.

Notice of Appeal from Judge Pierce's Order, dated June 28, 1976  
 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration :  
 between :  
 FAIR WIND MARITIME CORPORATION, : 76 Civ. 2293 (LWP)  
 as Owners of the S.S. "ISABENA", :  
 Plaintiff,

and : NOTICE OF APPEAL  
 TRANSWORLD MARITIME CORPORATION, :  
 as Charterers, :  
 Under a Charter Party dated :  
 June 14, 1972.

S I R S:

PLEASE TAKE NOTICE THAT Defendant, Transworld Maritime Corporation, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Final Order entered herein on June 18, 1976, as grants Plaintiff's motion to compel Defendant to proceed to arbitration before the presently constituted Panel of Arbitrators and denies Defendant's counter-motion requesting the Court to dismiss the Panel of Arbitrators at this time.

New York, New York  
 June 28, 1976

HARRINGTON HARLOW

ATTORNEY FOR DEFENDANT  
 TRANSWORLD MARITIME  
 CORPORATION

To: CLERK  
 United States District Court  
 Southern District of New York  
 Foley Square  
 New York, New York 10007

Jack Greenbaum, Esq.  
 Healy & Baillie  
 29 Broadway  
 New York, New York 10006

Copy received  
8/30/76  
Healy & Baumer  
LLC